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THE

126

AMERICAN LAW REGISTER.

NEW SERIES,
VOLUME I.
(OLD SERIES, VOL. 10.)

FROM NOVEMBER 1861 TO NOVEMBER 1862.

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Hon. ISAAC F. REDFIELD, Boston.

Prof. AMOS DEAN, ALBANY, N. Y.

Prof. THEODORE W. DWIGHT, N. Y.

HENRY WHARTON, Esq., PHILA.

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THE

AMERICAN LAW REGISTER.

NOVEMBER, 1861.

RAILWAY PASSENGER TRAFFIC.¹

I. THE DEGREE OF CARE REQUIRED OF RAILWAY COMPANIES.

1. No insurance of passengers, but only the utmost care, diligence, and skill.
2. The degree of care, &c., is always proportioned to the hazards of the business.
3. The fact that injury occurs on a railway, presumptive evidence of negligence
4. And it will make no difference that the passenger had a free ticket.
5. Unless it was conditioned to be at his own risk, or the passenger went in some unusual mode, for his own convenience.

II. THE POWER OF RAILWAY COMPANIES TO MAKE RULES AND REGULATIONS AFFECTING PASSENGERS.

1. They may exclude from their cars, stations, and grounds, persons having no business there, and control the conduct of those who have.

¹A PRACTICAL TREATISE UPON THE LAW OF RAILWAYS. BY ISAAC F. REDFIELD, LL.D., Chief Justice of Vermont. *Second Edition.* Boston: Little, Brown & Co. We shall be excused for the frequent references which we make to this work, since the substance of our article is based upon its arrangement and analysis of the subject; and it would be scarcely less than an affectation to attempt to make it appear otherwise. The decided cases, too, as is well known, are so numerous, upon many of the points embraced in our article, that a particular reference to all would, far too much, encumber our pages. We have, therefore, contented ourselves with naming a leading case or two, either English or American, under each head; and referring the reader to the above work, where he may find all the cases which had been published at the date of the edition, carefully analyzed, with the precise point decided in each, abstracted.

2. May discriminate between fares paid at stations and in the cars.
3. So also between way-fare and through-fare.
4. And may require passengers to go through in same train.
5. Or in a prescribed time.
6. May exclude merchandise from passenger trains.
7. And passengers may be required to pay five cents additional fare at each payment in the cars.
8. Servants of company may enforce the regulations in reasonable manner. Their acts bind the company.
9. Company cannot enforce penalties, except by legislative provision.
10. May not make unreasonable restrictions as to baggage.
11. Should exclude mere intermeddlers from their grounds.
12. The law implies mutual contracts for safe transportation and good behavior.
13. And to deliver passengers in advertised time.
14. And to make advertised connections.
15. Must give proper notice of time and place of changing cars.
16. The rule of damages in the several cases above enumerated.

III. THE RESPONSIBILITY OF DIFFERENT COMPANIES FORMING CONTINUOUS ROUTE, WHERE THEY SELL THROUGH TICKETS.

1. Not commonly regarded as a partnership.
2. But will be, if entire line is consolidated, and net fare divided rateably.
3. The responsibility for baggage is the same as for freight, and binds each company for the entire route.
4. But as to passengers it is the same as separate tickets for each road.

THE TRANSPORTATION OF PASSENGERS upon railways is one of the most extensive and important of the material interests of the country. There is no other, perhaps, which affects so large a number of persons, and at the same time is liable to become so essential to life, and health, and comfort, and every thing else, which makes up the sum of social happiness and enjoyment. We have thought therefore, that we could not do a more essential service to the profession throughout the country, than by giving them a succinct and comprehensive analysis of the law applicable to that subject in its numerous departments. Nothing more than a brief resumé of the doctrines and decisions affecting its complicated and manifold relations, could be brought within our narrow limits. Its full discussion would require a volume, and one which we hope some time to welcome. But we trust we shall be able, within reasonable compass, to give the outline of the most essential topics which will go to

make up such a volume, devoted exclusively to the transportation of passengers upon railways.

I. We begin with the degree of care required of railways in the transportation of passengers.

1. There is no actual insurance of the safe arrival of passengers at their destination without injury : Redfield on Railways, § 149, pl. 1, p. 323. The degree of care required of passenger carriers is well defined by EYRE, Ch. J., in *Aston vs. Heaven*, 2 Esp. R. 533. Carriers of passengers are not "liable for injuries happening to passengers, from unforeseen accident or misfortune, where there has been *no* negligence or default." "A driver is answerable for the *smallest negligence*." If any degree of negligence have intervened in any of the particulars which go to make up the entire force and apparatus connected with passenger transportation, a liability for any evil consequences resulting therefrom will attach: Redfield on Railways, § 149, and cases cited.

2. The degree of care and watchfulness required in any particular business is to be proportioned to the importance and the hazards of such business. If the business be of the highest moment, then the care, diligence, and skill should also be of a similar character : *Briggs vs. Taylor*, 28 Vt. R. 180, 184; CURTIS, J., in *Steamboat New World vs. King*, 16 Howard U. S. R. 474; Redfield on Railways, § 149, note 5; *Fletcher vs. Boston and Maine Railway*, 1 Allen R. 9.

It is scarcely necessary to add, that when we consider the vast importance of railway transportation and its extreme peril and hazard to life and limb in case of accident, it is proper that the courts should require every precaution, to insure the safety of passengers, which study and skill can devise, or art accomplish. And there has generally been no backwardness in that particular hitherto manifested in the courts. And the complaints which have come from interested parties, as if the courts made it a rule to hold every railway company liable, when any loss or injury occurred, is certainly not so well founded in fact as one might affect to believe. And if most cases of accident are found to be the result of carelessness, it is not so wonderful if courts and juries hold a

firm hand upon the companies. Jurors, who have the chief responsibility in deciding these questions, are generally shrewd and sensible men. And if they have seemed to proceed upon any such rule, as that alleged, it has been because the manner of an accident occurring, in railway passenger trains, has generally demonstrated that some precaution, having a tendency to prevent the disaster, was omitted, and which, if it had been taken, would probably have secured the safety of all.

The familiar gossip of the companies and their employees, too, that railway transportation of passengers is the safest in the world, in proportion to the number exposed, has precious little foundation in truth, as applied to existing circumstances. And if it had, would be a mere evasion of the question. The inquiry is not how safe, comparatively, railway travelling now is, but how safe it may be made with proper care and skill. If railway travelling, then, with the existing want of care and skill, is still safer than any other, it only shows how entirely safe it is susceptible of being made. And if that be true, it exhibits the wrong of allowing such fearful accidents as now occur almost daily, in a most inexcusable point of light. The effort to escape such perils should be in proportion to their disastrous consequences. And the degree of safety which the Courts ought to require should be the utmost which is attainable within reasonable limits of expense.

The truth undoubtedly is that railway travelling, in this country, with single tracks and imperfect construction and equipment, is rendered astonishingly exempt from calamitous disasters. But, when we attempt to convince ourselves that, in its present state, it is less perilous than any other mode of conveyance; the wish is generally father to the thought. The number of accidents and disasters is, doubtless, diminished by it; but the fatal consequences of them, when they do occur, are immensely multiplied; and it is either a delusion, or an affectation, which would induce any one to argue the contrary. There are hundreds now killed, or rendered useless for life, by railway accidents, where one such case occurred in the former modes of travelling. It is the very frequency of such disasters that induces the public mind to look upon them in any

other light than that of wholesale murder. And when they are attempted to be salved over by the trite falsehood of the general, or comparative, security of railway travelling, it is time to remonstrate, both against the supineness of railway directors and employees, in leaving open so much room for these calamitous occurrences, and the facility with which the public mind is hoodwinked and deluded into the belief that they are inevitable, and that they are but the necessary instruments of human demolition, in order to secure us against the too great multiplication of the race and the possible immortality of our poor humanity. The truth undoubtedly is, that the public have a right to require that this majestic mode of passenger transportation be made not only as safe as any other, but that it be made as safe as it is possible.

3. The fact that injury was suffered by any one while upon a railway train, as a passenger, is regarded as *prima facie* evidence of the liability of the company. *Hegeman vs. The Western Railway*, 16 Barb. Sup. Ct. R. 353; S. C. 3 Kernan, 9; Redfield on Railways, § 149, note 6.

4. It will make no difference in regard to the liability of the company, that the passenger was travelling on a free ticket. *Derby vs. Philadelphia and Reading Railway Company*, 14 How. U. S. R. 468, 483. It is the nature of the undertaking, and not the consideration, which creates the duty; and it makes no difference whether the consideration is of a pecuniary character, or results merely from the confidence reposed in the company. Their duty in regard to care, and diligence, and skill, is the same, in every respect, in either case.

5. But if the party chooses to ride on the engine, or in any other exposed situation, for his own convenience, after being made aware of his peril, the company are not responsible for the consequences. So too, if one accept a free ticket of the company, one of the expressed conditions of which is, that the company assume no responsibility in regard to the transportation either of the passenger or his baggage, the condition is binding. *Welles vs. New York Central Railway*, 26 Barb. R. 341. But if, in such case, the passenger is injured by gross negligence of the company, they are still liable

Bissell vs. New York Central Railway, 29 Barb. 602; *Redfield on Railways*, § 149, § 28, pp. 24-36, 328-330. And if one ride upon a freight train, for his own accommodation, he is not at liberty to demand the same accommodation or security which would be expected in passenger trains, but only such as is reasonable under the circumstances. See cases collected in *Redfield on Railways*, § 183, note 3.

II. The next subject which seems to demand our attention in this connection, is the power of railway companies to make rules and regulations affecting the conduct of passengers. This subject has been considerably discussed, first and last, but it is now firmly settled, that all such regulations as are necessary and reasonable are binding upon passengers. *Hodges on Railways*, 553; *Redfield on Railways*, § 28, pp. 24-36, and cases cited.

1. Railway companies may exclude or remove persons from their cars, stations, or grounds, for violation of the proper regulations and by-laws of the corporation. This may extend to the exclusion of persons having no business there, and the regulation of the conduct of such as have. *Commonwealth vs. Power*, 7 Met. R. 596; *Hall vs. Power*, 12 Met. R. 482; *Barker vs. Midland Railway*, 36 Eng. L. & Eq. R. 253; *Redfield on Railways*, §§ 26, 27, 28, pp. 24-36, and cases cited.

2. Railway companies may discriminate between fares paid at the stations and those paid in the cars. This is reasonable and just, since it costs the company more to collect fares in the cars than at their stations, inasmuch as they have it not in their power to impose the same checks in regard to accountability. In the English and foreign railways, no passenger is allowed to enter a carriage of the company without a ticket, and it should be so here; and would be, doubtless, were it not for the difficulty of inducing Americans always to submit to reasonable constraint at the hands of others, where they do not fully comprehend its urgent necessity. In some parts of the United States the same regulations are enforced as on the foreign railways, but in other sections, such restrictions would be liable to produce embarrassment, and in some cases, uproar and collision with the servants of the company we fear. But as there is not the least question the companies have

the right to the rigid and strict enforcement of all such regulations, and have also a deep interest in their enforcement, it is hoped they will soon be enabled to do so. *Hilliard vs. Gould*, 34 N. H. R. 230; *Chicago, Burlington and Quincy Railway vs. Parks*, 18 Ill. R. 460; *Crocker vs. New London W. & P. Railway*, 24 Conn. R. 249; Redfield on Railways, §§ 26, 28, and notes. But where railway companies make a discrimination between the rate of fare paid in the cars and at stations, they must afford every reasonable facility for procuring tickets at the stations. *St. Louis and Chicago Railway vs. Dalby*, 19 Ill. 353.

3. So, too, the company may discriminate between way fare and through fare. *Reg. vs. Frere*, 29 Eng. L. & Eq. R. 143; Redfield on Railways, § 28, pl. 3, n. 3, 4.

4. And a regulation requiring passengers to go through in the same train, and if they do not, requiring them to pay fare for the remainder of the route, is entirely valid. *Cheney vs. Boston and Maine Railway*, 11 Met. R. 121; 1 Am. Railway Cases, 601; Redfield on Railways, § 28, pl. 4, and notes. And if the regulations of the company allow a passenger to stay over and then complete his trip on the same ticket, where he obtains the permission of the conductor and a memorandum on his ticket, he cannot claim that privilege without such memorandum. *Beebe vs. Ayres*, 28 Barb. R. 275. And if he refuse to pay additional fare he may be expelled from the cars. *Id.*

5. So also if one have a ticket marked "good only two days after date," he is not entitled to demand permission to ride upon it after the expiration of the time. Such a condition is regarded as evidence of a contract between the company and the passenger, that they shall not be required to carry upon the ticket after the expiration of the term limited. *Boston and Lowell Railway vs. Proctor*, 1 Allen R. 267.

6. A regulation excluding merchandise from passenger trains, even where it does not exceed the weight of the ordinary baggage of a passenger, is valid, since merchandise is not baggage. *Merriver vs. Milwaukee and Mississippi Railway*, 5 Am. Law Reg. 364.

7. And where the company, by standing regulation, required passengers paying in the cars to pay five cents more fare than if they paid at the stations, and a passenger paid only from station to station, it was held that he was liable to pay the additional five cents at each time of payment. *Chicago, Burlington and Quincy Railway vs. Parks*, 18 Ill. R. 460.

8. The servants of the company may enforce the just regulations of the company in a reasonable manner; and in so doing, the company are bound by their acts, and responsible for any peril or expense they incur on that account. But where a conductor or other employee of the company exceeds the reasonable limits of the law, in applying gentle force in the expulsion of a passenger from the cars, or in any other mode of enforcing such regulations, and thereby himself becomes the aggressor, he is liable for his own acts, and has no claim upon the company for indemnity. But the authorities are not agreed, whether in such case the company are liable also for the unauthorized act of their agent while employed in their business. The better opinion seems to be, that they are liable for the acts of their servants, so long as they keep within the limits of their employment, although they exceed their authority. *The Eastern Counties Railway vs. Broom*, 2 Eng. L. & Eq. R. 406; S. C. 6 Railway C. 743; *State vs. Vermont Central Railway*, 27 Vt. R. 108; Redfield on Railways, §§ 28, 160, 169, 225, and notes. This is certainly the general rule in regard to the liability of the master for the acts of his servants, and we see no reason to question its application to the case of corporations generally, or railways in particular. It is now entirely settled by the great preponderance of authority, both English and American, that railway companies and other corporations are liable to indictment for the acts of their officers and servants in transcending the powers secured by their charters. *Reg. vs. Rigby*, 6 Railway Cases, 479; *Queen vs. Scott and others*, 3 Q. B. R. 543; *Commonwealth vs. Nashua and Lowell Railway*, 2 Gray, 54; *Same vs. New Bedford Bridge Co.*, Id. 339; opinion of PATTERSON, J., in *Regina vs. Birmingham and Gloucester Railway Co.*, 3 Q. B. R. 231, and in Redfield on Railways, 515, note 2, § 225.

9. But it seems to be conceded that railway companies cannot impose and enforce penalties, either upon passengers or strangers coming upon their grounds, except in conformity to express statutory powers granted for that specific purpose. *Matter of Long Island Railway*, 19 Wendell R. 37; S. C. 2 Am. Railway, C. 453.

10. And a by-law, declaring that the company would not be responsible for a passenger's baggage unless booked, and the carriage paid, is bad, as being inconsistent with the general provisions of the English statute, allowing railway passengers to carry a certain amount and kind of baggage. *Williams vs. Great Western Railway*, 28 Eng. L. & Eq. R. 439. But this decision is questioned. Redfield on Railways, § 26, note 10.

11. There is a pretty general impression in many portions of the country, that the passenger stations of railway companies are public places, open to the ingress and egress of all persons, whether they have business there or not; and that any one has the right to pass and repass along the track of a railway. But nothing is farther from the truth. Mere loiterers have no more right to make a railway station the place of their rendezvous, than they have to apply a private dwelling, or a shop or storehouse, to the same purposes. And any persons presuming to come upon the company's land, whether at the stations or along the line of the road, are not only trespassers, in the strict technical sense, but they are intruders and intermeddlers, in the most offensive sense, since they thereby not only needlessly embarrass the operations of the company and expose their own lives to unnecessary peril and destruction; but they do also in more ways than we can here stop to enumerate, sadly and painfully imperil the lives of others. Redfield on Railways, § 27, pp. 28, 29, § 172, note 10. This is a thing which would not be tolerated in any State or country where government, in all its departments, was enabled to exercise the proper control. But we are sorry to say, that the American people, with the best and purest intentions, are slow to submit to restrictions upon their freedom of action, the absolute necessity of which they do not comprehend. We trust they are now in a

school where they will be likely to grow wiser and better in that respect. See the question further discussed in *Redfield on Railways*, § 172, and notes. The company may exclude any particular hackman or passenger carrier from coming within the precincts of the grounds adjoining their stations. *Barker vs. Midland Railway*, 36 Eng. L. & Eq. R. 253.

12. In the absence of all express contract the law implies one, on the part of the company, for safe transportation according to the general course of their trains, as indicated by their public advertisements and notices; and on the part of the passenger that he will pay the usual and regular fare, and will, in all respects, conduct in a decent and orderly manner, and conform to all the legal by-laws and regulations of the company. *Frink vs. Schroyer*, 18 Illinois R. 416. And fare will be presumed to have been paid in the ordinary way: *McGill vs. Rowand*, 9 Barr, 451; *Redfield on Railways*, § 131; *Harris vs. Stevens*, 31 Vt. R. 79.

13. And where railway companies do not deliver a passenger in time, according to their public announcements, whereby he fails to make the proper connections, so as to enable him to pursue his contemplated route; or, if he is otherwise essentially embarrassed in regard to his business, they will be liable for all damages thereby sustained. *Hodges on Railways*, 619; *Redfield on Railways*, § 154, note 1.

14. And where a railway company continues to advertise the connection of trains, at a point beyond the terminus of their own road, after the same has been discontinued, whereby one suffers pecuniary loss by not being able to proceed in the manner indicated by the advertisements, the company are responsible for all damages. *Hawcroft vs. Great Northern Railway*, 8 Eng. L. & Eq. R. 362; *Denton vs. Same*, 34 Eng. L. & Eq. R. 154.

15. The company are responsible, too, that proper notice be given to passengers of the places of changing cars, and that this be done in such a manner, that every person of common understanding and watchfulness would not be in danger of mistaking its import, or in doubt in regard to following it. And if this is done, the company are not responsible for any loss a passenger may sustain by mistaking

the place of changing cars, or by taking the wrong train. But if the passenger discovers his mistake in time to return and take the proper route, and is offered to do so without additional charge, and declines to do it or to leave the cars, or to pay his fare on the route he is travelling off the route, for which he had tickets, he may lawfully be expelled from the cars. *Page vs. New York Central Railway*, 6 Duer, 528.

16. But the rule of damages which has been adopted in some of the English cases, of allowing nothing more than the extra expense at hotels and for additional fare, if anything, on account of not going through by the same train; and refusing all allowance of special damages, in consequence of loss of time and embarrassment in one's business arrangements and connections, seems almost like a denial of justice. *Hamlin vs. Great Northern Railway*, 38 Eng. L. & Eq. R. 335; Redfield on Railways, § 154. The true rule undoubtedly is to allow such damages as might naturally have been expected to follow from such an interruption as occurred, under all the circumstances, known to the passenger at the time he purchased his ticket; such as he would have been likely to have claimed, if the consequence of such a disappointment had been pointed out to him by the company at the time; and not to allow such special damages, as might actually occur, contrary to the ordinary course of events, and which could not have been within the contemplation of the parties, or either of them, at the time of entering into the contract. This is in accordance with the general rule of damages now established in analogous cases. Redfield on Railways, § 154 and notes, § 131 and notes.

III. The precise liability incurred by the different roads constituting a continuous line, where they sell through tickets, in the form of coupons, for each separate road, is sometimes an embarrassing question.

1. It is not, in general, regarded as a case of partnership, so as to render each road liable for all losses occurring upon any portion of the road: *Ellsworth vs. Tartt*, 26 Alab. R. 733; *Briggs vs. Vanderbilt*, 19 Barb. R. 222.

2. But where the entire line is consolidated, and the fare divided

rateably, all losses being first deducted, it has been construed to constitute a partnership so far as responsibility to third persons is concerned: *Champion vs. Bostwick*, 11 Wendell, 572; S. C. 18 Id. 175.

3. And the responsibility of common carriers of goods, and that of passenger carriers of baggage is the same. The taking pay and giving tickets or checks through, makes the first company liable for the entire route. And it has been held that, as to baggage, each company is liable for a loss upon any portion of the route: *Hart vs. Rensselaer and Saratoga Railway*, 4 Selden, 37; *Straiton vs. New York and New Haven Railway*, 2 E. D. Smith, 184. The person selling the ticket is regarded as agent for each company: Redfield on Railways, § 128; § 135, and notes.

4. But, as to the transportation of passengers, the rule has been considered somewhat different. Such coupon-tickets import, ordinarily, no contract to carry beyond the limits of the particular road for which each separate ticket is sold, the undertaking of each road being several and not jointly with the others. Each successive road undertaking for its own line and the proper connections at its terminus: *Sprague vs. Smith*, 29 Vt. R. 421; *Hood vs. New York and New Haven Railway*, 22 Conn. R. 1, S. C. Id. 502. In this last case the court held that an express contract by a railway company to carry beyond its own line, would be ultra vires, and so not binding. The decision in that respect stands alone, at present: Redfield on Railways, § 158, and notes. The sale of tickets for long routes, in the form of coupons, is regarded much in the same light as when the tickets of one company are sold at the stations of other companies. So far as the transportation of passengers is concerned, such transactions are regarded in the light of agency rather than of partnership. We trust we shall be able to recur to this subject, so replete with interest, and so prolific of litigation, and give a succinct epitome of the law affecting most of the questions which have hitherto arisen in the courts of justice in regard to it. In the meantime, if what we have said, shall induce, in any reader, the desire that we had said more upon the topics already discussed, we can

only say that our space forbade it, and that we have said all that we deemed it prudent or proper to say, at the time, upon this whole subject, in the work named at the beginning of our article.

I. F. R.

RECENT AMERICAN DECISIONS.

In the United States Circuit Court for the Southern District of New York.

PHILIP ALLEN ET AL., vs. F. SCHUCHARDT ET AL.

S., acting for parties at Amsterdam, put into the hands of a broker in the city of New York a sample bottle of a quantity of madder, to negotiate a sale. The sale was made in Rhode Island, by the broker, in the name of S., the foreign principal not being disclosed, under an oral contract to A., upon the inspection of the sample bottle, which he refused to open on account of the instructions of S. The madder was, at the time of the sale, in barrels, in a vessel at the port of New York. After the contract was made, a bill of goods was furnished to the purchasers, with a clause, that "no claims for deficiencies shall be allowed unless made within seven days from receipt of goods." The madder in the casks proving inferior to its apparent qualities in the bottle, an action on the case was brought against S., by the purchasers, for damages.

Held—1. The oral contract made in Rhode Island, where the statute of frauds does not prevail, can be enforced here, although the contract, if made in the same manner in New York, would have been void. The fact that the merchandise was in New York does not affect the question.

2. The action on the case is a proper remedy, and it is not necessary to aver a *scienter*.

3. The sale was by sample, and there was an implied warranty that the merchandise should correspond with the apparent qualities of the sample.

4. The clause in the bill of goods respecting deficiencies, is inoperative, as the contract was previously complete.

5. S. not having disclosed his principals, is personally liable.

Before NELSON, C. J., and SHIPMAN, J.

The sample of a quantity of madder was put into the hands of a broker in the city of New York, by the defendants, to make sale of it for them. A sale was made accordingly to the plaintiffs in the State of Rhode Island, upon an inspection of the sample bottle,

which the broker refused to open on account of instructions from his principals. The sample bottle had been forwarded from Amsterdam to the defendants, previous to the shipment of the bulk, and was the only sample of the goods, as none accompanied them. The madder was in barrels, in the vessel, which had arrived in New York, about the time of the sale. The sale was made in the name of the defendants, their principals not being disclosed.

The opinion of the Court was delivered by

NELSON, C. J.—I. The contract of sale in this case was made in Rhode Island, and, though verbal, is there valid, as no sale note is required, as in our statute of frauds. The madder, the subject of the sale, being in New York, or elsewhere, at the time, does not affect this question.¹

II. The action on the case for a false warranty, is certainly a somewhat antiquated remedy, the action of assumpsit having taken its place; yet we cannot say that it has been abolished or modified on account of the substitution, by the profession, of the new remedy. There are certain advantages to be gained by the adoption of the one or the other, which are not common to both, and, in a count upon a false warranty, the pleader need not aver the *scienter* any more than in that of assumpsit. 1 Wh. Selwyn, p. 486; 2 East, 446; 2 Chitty Pl., p. 101, N. P. 276-7; 1 ib. 139.²

III. The sale of the madder was a sale by sample, where the purchaser had no opportunity to examine the bulk; and where he was prohibited by the vendors from opening the sample bottle for the purpose of examining the article, by which act we are inclined to think they assumed the responsibility of maintaining that the bulk was equal to the quality of the article as it appeared to the eye in the bottle. The sale was not only by sample, but was obviously intended to be such by the vendors, as the sample of the madder preceded the arrival of the bulk from abroad, and no sample accompanied it. The sample thus previously forwarded was put into the hands of the broker to sell the one hundred barrels subsequently shipped. This sample thus forwarded was the only one furnished representing this quantity of madder.

¹ See Note 1, *post*

² See Note 2, *post*.

IV. The sale being a sale by sample, there was an implied warranty³ that the bulk was equal to the sample in quality, which, upon the evidence in the case, it clearly was not. All agree that, from an inspection of the sample, the madder appeared to be pure and unadulterated. From a careful analysis of the bulk by chemists, there was an adulteration, by sand and other foreign substances, exceeding thirty per cent. This evidence preponderates over the weight of the testimony abroad, taken on commission. There was no analysis of the article abroad.

V. The note at the head of the bill of goods rendered "no claims for deficiencies or imperfections allowed, unless made within seven days from receipt of goods," was not binding upon the purchasers. The contract was complete and binding upon both parties before this bill was delivered.

The case is an unfortunate one, as both parties are innocent, the fraud having been perpetrated abroad before the goods were shipped to the defendants, who were mere consignees. The question is, which of these innocent parties, under the facts disclosed, should suffer the loss? The question turns upon a dry rule of law, and, according to my idea of it, the plaintiffs are entitled to the judgment.⁴

The verdict of \$10,000 was taken by consent, subject to adjustment and the opinion of the Court upon a case made. I shall deduct thirty per cent. from the price paid for the madder, as furnishing the amount of damages in the case, and give judgment for plaintiff for that sum.

(1.) The familiar principle in this class of cases is, "that so much of the law as affects the *rights and merits* of the contract, is adopted from the foreign country; so much of the law as affects the *remedy* only, is taken from the local law of the country where the action is brought." Does the Statute of Frauds affect the contract or the remedy? It has been held in England, after an extended and elaborate discussion, that the *fourth* section of the statute affects the

remedy, and consequently that an oral agreement within that section, made in France, and valid there, cannot be enforced in England. *Leroux vs. Brown*, 12 C. B. 800; S. C. 14 Eng. L. Eq. 247, (1852.) The court rests its decision upon the special language of that section: "*No action shall be brought upon any agreement which is not to be performed within a year, &c., unless the agreement upon which such action shall be brought or some memorandum or note thereof*

³ See Note 3, *post*.

⁴ See Note 4, *post*.

shall be in writing," &c. The construction placed upon this language was, that the words, "no action shall be brought," evidently regarded the *remedy*, and the alternative clause showed that the writing was required only for the purposes of evidence. There were *dicta* to the effect that such a construction would not be given to the seventeenth section, regarding sales of goods. These *dicta* were followed in 1855, by the Supreme Court of Missouri, in *Houghtaling vs. Ball*, 20 Miss. (5 Bennett), 503. The court expressly decides that an oral contract for the sale of *goods*, made in a state where the Statute of Frauds does not prevail, can be enforced in Missouri, where the statute exists substantially in the language of the English seventeenth section. Browne, in his work on the Statute of Frauds, p. 140, note 5, (ed. 1857,) disapproves of the distinction, citing *dicta* in *Carrington vs. Roots*, 2 M. & W. 248; *Reade vs. Lamb*, 6 W. H. & G. Exch. 180. The Missouri case, however, was not before him, and the principal case is in the same direction. There is no distinction in the present New York Statute of Frauds, between the two classes of subjects, and the decision would embrace all the sections. In *Dacosta vs. Davis*, 4 Zabriskie, 319, the authorities are collected in reference to the question whether the absence of the goods affects the law of the place of contract. In this case a contract was made in New Jersey, for the sale of goods at the time in Pennsylvania. The court arrived at the conclusions reached in the present case.

(2.) The old rule was that all actions upon a warranty, whether express or implied, were actions on the case. As to implied warranties, see *Keilwey*, 91.

Lord Ellenborough, in the case of *Williamson vs. Allison*, 2 East, 446, (1802,) says, that the form of declaring in *assumpsit* in cases of warranty, had

not then prevailed above forty years, and was adopted in order to add the money counts to the declaration. The right to declare in *assumpsit* on an express warranty, was first discussed and decided in *Douglas*, 18, (1778.) The distinction as to the necessity of alleging a *scienter* is that if the action is on a warranty, it is not necessary, but if it be in the nature of an action of deceit, *without any warranty*, *scienter* must be alleged and proved: Note to *Williamson vs. Allison*, *supra*; *Stone vs. Denny*, 4 Metcalf, 151; 5 B. & A., 797; *Bayard vs. Malcolm*, 1 Johnson, 453. The right to bring an action on the case, for breach of warranty, is fully recognised in this country, among other cases, in 30 Maine, 170; 3 Vermont, 53; 20 Conn., 271; 4 Blackf. 293. An important advantage may sometimes be secured in joining a count for fraudulent misrepresentation with the count on an express warranty, and a recovery thus may be had in accordance with the evidence. A judgment will, it seems, be a bar to an action of *assumpsit* on the warranty: 23 Pick. 256.

(3.) In determining whether a sale is by sample or not, a material inquiry is, whether the article is open for inspection. It is a reasonable rule, where it is not present and a sample is exhibited, that the sale should be treated as being by sample.

The correspondence of the sample with the article, is the essence of the contract, and the purchaser may say, if this correspondence does not exist, *non in hæc fœdera veni*: *Boorman vs. Johnston*, 12 Wend. 576; *Salisbury vs. Steiner*, 19 Wend. 159; 1 Smith Lead. Cas. 77; note to *Chandeler vs. Lopus*. This principle is in like manner true of a written contract for articles of a particular name not open to inspection: *Wieler vs. Schilizzi*, 17 C. B. 617.

When the article and sample are both open to the purchaser, the same principle does not necessarily prevail. There must be an agreement to sell by sample, or at least an understanding of the parties that the sale is to be a sale by sample: *Waring vs. Mason*, 18 Wend. 434. The question can only be answered by a view of all the circumstances of each case, and the intention of the parties must be gathered from their acts. It is a question of intention, and must be submitted to the jury. The evidence must be sufficient, from which the jury can find that the sale was intended to be a sale by sample: *Beirne vs. Dord*, 1 Selden, 95; *Hargous vs. Stone*, 1 Selden, 78. An exhibition of a sample in such case, without anything more, is only a representation that it has been taken fairly from the bulk of the commodity: *Id.*

In case of a technical sale by sample, if the article is not equal to the sample, the contract may be rescinded or the merchandise may be retained and an action for damages be brought: 2 Kent's Com., 481; Story on Contracts, § 540; authorities collected by Jewett, J. 1 Seld., 99.

The question decided in this case, that the merchandise must, under the facts proved, correspond with the appearance of the sample, and not simply with its real qualities, is of the first impression. The vendor may be regarded as estopped from denying that the *apparent* and *actual* qualities of the goods were different.

(4.) The defendants were liable, not having disclosed their correspondents, on well settled principles of law. If they *had disclosed* their principals, the question would have been raised, whether, as *foreign* factors, the presumption of law is that the dealing was exclusively with them. This doctrine, which was advanced by Judge Story, (Agency, sec. 268, and note 290, 423,) was combated, 2 Kent Com. 630, 631; 22 Wend. 244; disapproved and discarded in *Green vs. Kopke*, 18 C. B., 548, (1856,) and in *Oelricks vs. Ford*, 23 How. U. S., 49, (1859,) Nelson, J., delivering the opinion of the court. The question is one of intention, to be gathered from surrounding circumstances, such as usage, &c. The fact that the principals were foreigners, might be an element in reaching the conclusion. Jervis, C. J., in *Green vs. Kopke*; Coleridge, J., in *Mahony vs. Kekulé*, 5 Ellis & Black., pp. 125, 130. See *Heald vs. Kenworthy*, 10 Exch. 789. "The question is one of fact and not of law," Parke, B. The doctrine itself was only extended to goods sold by *oral* contract. *Bray vs. Kettell*, 1 Allen (Mass.), 80, (1861,) per Bigelow, C. J. Where there is a written contract, properly executed by an agent, as if signed "A. B., principal, by C. D., agent," and the language is unambiguous, a foreign factor is no more liable than a domestic factor, S. C.

T. W. D.

In the Supreme Court of Pennsylvania, 1861.

JEPHTHA KILLAM vs. GEORGE KILLAM.

1. An estate already descended cannot be divested from the legal heirs, and given to the bastard child of an intestate, by a subsequent statute of legitimation; but the legislature may cure the taint of a bastard's blood for the purpose of future inheritance.
- 2 By an act of the Legislature, passed in 1853, it was provided that George W. K., son, and Emily M., daughter of George K., shall have and enjoy all the rights and privileges, benefits and advantages of children born in lawful wedlock, and shall be able to inherit and transact any estate whatsoever, as fully and completely to all intents and purposes, as if they had been born in lawful wedlock." The persons named were children of George K., in point of fact, by the same mother, who, after their birth, but before the passage of the act, had been married to a third person, X. At the date of the act all parties were living. George W. died in 1859, unmarried, and without issue, seised of land which had been conveyed to him by his father. In an ejectment by the father against a grantee of X. and his wife: *Held*, that the effect of the act of 1853, was to remove, for all purposes of inheritance, the defect of blood of the children, as though, at the time of their birth, their parents had been lawfully married; that the land passed, under the intestate laws of this State, to his natural parents for their joint lives, notwithstanding that the mother was then still the wife of X., remainder to his natural sister, Emily M., in fee; and therefore that the father was entitled to recover, but only as to an equal moiety of the land.
3. *Held*, also, that the case was not affected by the general law of 1855, which provides that the estate of a bastard, dying unmarried and without issue, shall pass to his mother absolutely.
4. *Held*, further, that the fact that the conveyance of the land in question to George W. K., by his father, was expressed to be in consideration of natural love and affection, was not material.

Error to Common Pleas of Wayne county.

The opinion of the Court was delivered by

WOODWARD, J.—The reason why a bastard cannot inherit, by the common law, is because he is the son of nobody. Having no ancestor, his blood possesses no inheritable quality; though in respect of his own children, it has the usual descendible quality of pure blood. But a bastard may be made legitimate and capable of inheriting, says Blackstone, and 4th Inst. 36, by the transcendent power of an act of Parliament, and not otherwise, as

was done in the case of John Gaunt's bastard children by a statute of Richard II. We have on our statute books acts of legitimation without number. Because our constitution is silent on the subject, the legislative power is plenary. I am not aware that it has ever been questioned. An estate that has already descended to the legal heir cannot be divested and given to the bastard by a subsequent act of legitimation; but that the taint of his blood may be cured for the purposes of future inheritance by the healing touch of the legislature, is not to be doubted. It is not so questionable an exercise of power as the restoration of inheritable blood by the reversal of an attainder for treason; for the corruption there proceeds from disloyalty to the State, which is a much more grievous offence than fornication.

The business now in hand, however, is not to vindicate the legislative power to restore bastards, but to interpret an act of legitimation. In 1853 the legislature enacted, "that George W. Killam, son, and Emily Miles, daughter, of George Killam, of Wayne county, shall have and enjoy all the rights and privileges, benefits and advantages of children born in lawful wedlock, and shall be able and capable in law to inherit and transmit any estate whatsoever, as fully and completely, to all intents and purposes, as if they had been born in lawful wedlock."

These are very large enabling words. The very definition of a legitimate person is one born in lawful wedlock, and whatever capacities to inherit or transmit an estate such a person possessed in 1853, or should acquire thereafter, were to belong to George W. Killam, and to be among his "rights, privileges, benefits, and advantages." So much is clear. But lawful wedlock with whom? The mother of George W. and Emily is not mentioned or referred to in the enactment. Whether they were children of the same mother, and who was the mother of either or both, the legislature seems not to have known or inquired. They meant undoubtedly that the children should have the same legal capacities as if their father had been at their birth the lawful husband of their mother, and it is fortunate that the construction of the act is rendered easier by the ascertained fact that they had a common mother.

Elizabeth Tyler was the mother of both. They were both born before 1821. After their birth, but long before the act of 1853, their mother was married to Nathaniel Tyler, and both she and the father, George Killam, survive both children. Emily married, and died in 1860, leaving a husband and three minor children. George W. died intestate in 1859, unmarried, and without issue, seized in fee simple of two hundred and eighty acres of land, the subject of the present controversy. In 1860, Tyler and wife conveyed the land to Jephtha Killam, with a full notice that it was claimed both by the father, George Killam, and by the sister, Emily Miles, then still alive. This ejectment was brought by George Killam, the father of the bastard, against Jephtha, the purchaser, from the mother of the bastards, and upon this state of facts the court so construed the act of 1853, as to give the judgment and the land to the plaintiff.

The necessity of defining the exact effect of the act of 1853, is shown by our general intestate laws, which provide for the succession to the estates of intestate children, whether they be legitimate or illegitimate. If legitimate, the real estate, by the 3d section of the act of 8th April, 1833, relative to intestates, goes to the father and mother of the intestate child during their joint lives and the life of the survivor; and by the 5th section to them in fee simple, "in default of issue, and brothers and sisters of the whole blood and their descendants." If the descendant be an illegitimate, then by the 3d section of the act of 27th April, 1855, his real estate goes to his mother in fee simple.

Was George W. legitimate or illegitimate, when he died in 1859? That depends on the effect of the act of 1853. If legitimate, then his father and mother, both being alive, take a joint estate for life in his lands, and his sister, being of full blood, took the remainder in fee, which at her death descended to her heirs. If, on the other hand, he was illegitimate, then under the act of 1855, his mother took the whole in fee simple.

The learned judge must have thought, as the counsel for the defendant in error argues, that after the act of 1853 the children ceased to be illegitimate only as "*between their father and them*

scloes." Notwithstanding the full and strong terms of that legislation, counsel will not agree that it legitimated the children any further than as concerned the one parent. To concede that it legitimated them as to both parents, would admit the mother to a joint inheritance. The immediate effect of such a qualified construction of the act must be to leave them illegitimate as to the mother, and then the act of 1855 brings her in. The only answer which the counsel make to the act of 1855 is, that George W. Killam was not, at its passage, of the class to which it applied. He had been created, say they, the legitimate son of his father by legislative enactment. He had been taken out of the inferior class of illegitimate, "and clothed with all the civil rights of the superior class of legitimate children."

The argument is manifestly *felo de se*. You kill your first position of a qualified or half legitimation, by your second, which invests the children with *all* the civil rights of legitimacy. The question here is not one of inheritance, but of transmission. George W. might have controlled the direction his estate should take by a will, but he elected to leave it to the transmission of the intestate laws. He must be presumed to have known what they were.

It is a truism, too simple to need more than mere assertion, that for the purposes of the intestate acts he must have been either legitimate or illegitimate. They provide for no mongrels or hybrids. Then let it be said that he was legitimate, that though not born in lawful wedlock, the transcendent power of the legislature has made him equal to a son born in lawful wedlock, that though his mother was not ascertained or mentioned by the legislature, she is fully identified by the parties litigant, and her maternity admitted in the record before us, and, therefore, that in legal judgment she should be recognised as entitled to a joint life estate with the defendant in error in the decedent's lands. What is the objection to this? It may be said it is giving undue effect to the act of 1853—that it is virtually making wedlock betwixt a man and a woman who is married to another man—that if the bastards had had several mothers, it would be marrying Killam to each of them, and that it estab-

lishes inheritable blood betwixt a brother and sister, as well as between a father and his children. Let all these consequences be accepted, and what do they amount to? Notwithstanding Mrs. Tyler's present wedlock, she might have been Killam's lawful wife when these children were born. The legislature were not necessarily guilty of an historical untruth, or even of an anachronism, in enacting that she was. A divorce would have qualified her for the second marriage. How do we know that these children were not born in lawful wedlock, the legislature having said they were? How can we impeach the union between the parents, whatever it was, since the legislature has made it lawful? And why should not the act be construed to make George and Emily brother and sister? It is judicially ascertained that they were children of the same father and mother, and they have been legislatively declared legitimate. They then were in law, as in fact, brother and sister of the full blood. As to the embarrassment which would be upon us if they had happened to have been born of different mothers, sufficient unto the day is the evil thereof. That question is not before us, and it shall not distress us.

The other construction of the act of 1853, that which qualifies the legitimacy granted, is not free from greater difficulties. It is opposed to the terms of the enactment, which is sufficient to set it aside. We have seen that the words used by the legislature were large enough to confer all the civil rights of legitimacy, and as it was a remedial and a humane law, it ought not to be cramped in the construction. But again; the intestate laws cannot be administered on the theory of a partial legitimacy. This is apparent enough from what has been already said. It is to be observed that when they admit the mother to the inheritance of a deceased child, whether a legitimate or illegitimate, they admit her not as the wife of the father, but as mother. It is of no moment, therefore, that Mrs. Tyler is not Killam's wife, since he confesses her to be the mother of his children. In that maternal character she takes under the intestate law. If the act of 1853 was intended for the very special purpose supposed by counsel, of establishing relations between the father and son in respect to the land in ques-

tion, how do they account for Emily being embraced in it, between whom and her father there were no transactions in land?

In view of the difficulties of both constructions, we think it more congenial to the spirit of our intestate laws, and more honorable to the motives of all parties, to impute to the act of 1853, not the narrow and inconsistent purpose contended for, but the more generous intent of eradicating all manner of taint from the blood of both George and Emily, and compelling the world to treat them, for all purposes, as legitimate. The consequence is, that George could transmit and Emily could inherit under the intestate laws as if no defect had ever existed.

We see nothing to change our judgment in the fact that this land was conveyed to George W. by his father for a consideration of natural love and affection. He held it as a purchaser, and at his death the fee simple descended to his sister, subject to a life estate of his father and mother for their joint lives, and the life of the survivor. By her the mother's conveyance to Jephtha Killam took what she held, and no more, and, therefore, the judgment should have been for the plaintiff below, not for the whole, but for a joint undivided moiety of the premises.

The judgment is reversed, and judgment is now entered here in favor of George Killam, the plaintiff below and defendant in error, for an undivided moiety of the land mentioned in the writ.

STRONG, J., dissents.

One of the most difficult questions in constitutional jurisprudence, is as to the extent to which civil rights may be affected by retrospective legislation. The fact that neither in the Constitution of the United States, nor in most of those in the separate States, is there any express provision to guarantee them against such interference, has often been observed upon with surprise. While personal liberty and personal security, and the obligation of contracts are guarded with care, other rights are left to depend to a great degree for their protection,

upon what is at best but vague and doubtful language. As the right of private property is one of the chief bases of civil society, it might naturally have been expected that some clear and emphatic prohibition against legislation which should impair its integrity, would have found a prominent place in the organic laws of a congeries of republics. Even in the Code Napoleon, in which no great jealousy of the sovereign authority is to be expected, it is declared at the very outset: "*La loi ne dispose que pour l'avenir; elle n'a point d'effet retroactif.*"

(Cod. Civ. Tit. Prel., Art. I., Sect. 2.) And, while in the Roman law no limit could be admitted in practice, to the arbitrary power of the Prince, still, in theory, it was always received as a fundamental maxim, *Leges et constitutiones futuris certum est dare formam negotiis, non ad facta præterita revocari.*

Whether the absence of any general prohibition against the disturbance of private rights in our constitutions, is to be attributed to the same cause which made the Roman laws silent on the subject of parricide, because it was not deemed wise to admit the possibility of such a crime, or to an inherent difficulty in determining the just limits of retroactive legislation, it is not easy to say. It is certain that among the restrictions fixed by the constitution of the United States upon the powers of the States, there is none which prevents the passage of retrospective laws, however unjust or impolitic, except only where they would affect some existing contract, or attach to some previous act penal consequences, which it did possess when committed, for this is the only sense in which the expression "*ex post facto law*" is to be received. *Calder vs. Bull*, 3 Dallas, 388; *Satterlee vs. Matthewson*, 2 Peters, 413; *Wilkinson vs. Leland*, Id. 661; *Watson vs. Mercer*, 8 Peters, 110; *Charles River Bridge vs. Warren Bridge*, 11 Peters, 539; *Carpenter vs. Comm.*, 17 How. U. S. 468; *Bennett vs. Boggs*, Baldwin C. C. 174. The self imposed limitations of the State constitutions are of course more extensive than this, but still, as a general proposition, the mere fact that a law is made to operate on past transactions, is not, by itself, sufficient to render it unconstitutional. *Calder vs. Bull*, 2 Root, 350; *Comm. vs. Lewis*, 6 Binn. 271; *Schenley vs. Comm.*, 36 Penn. St. 57; *String vs. State*, 1 Blackf. 196; *Fisher vs. Cockerill*, 5 Monr. 133; *Davis vs. Ballard*,

1 J. J. Marsh, 578; *Locke vs. Dane*, 9 Mass. 360; *Oriental Bank vs. Freese*, 18 Maine, 112; *Wilson vs. Hardesty*, 1 Maryl. Ch. 66; *Goshen vs. Stonington*, 4 Conn. 218; *Lockett vs. Usry*, 28 Geo. 349. Even if it could be considered to this extent, as a violation of the principles of natural justice, a court could have no power, on that ground alone, to declare it void: *Comm. vs. McClosky*, 2 Rawle, 514; *Lord vs. Chadbourne*, 42 Maine, 441. But retrospective legislation, so far from being a necessary infraction of those principles, may often operate in furtherance of equity, good morals, and social order, and where it does so, will generally be sustained, if obnoxious to no express constitutional restriction: *Trustees of Cayuga Falls, &c., Academy vs. M'Caughy*, 2 Ohio St., N. S. 152; *Goshen vs. Stonington*, 4 Conn. 218; *Savings Bank vs. Allen*, 28 Conn. 102. Indeed, in those States where such legislation has been prohibited in terms, the constitutional provision has received a judicial construction which deprives it of almost any special value, by admitting in practice, substantially the same exceptions, as are elsewhere allowed as qualifications of a mere principle of political justice: *Merrill vs. Sherburne*, 1 New Hamp. 199; *Woart vs. Winnee*, 3 Id. 474; *Clark vs. Clark*, 10 N. H. 386; *Gilman vs. Cutts*, 23 Id. (3 Foster) 382; *Willard vs. Harvey*, 24 Id. (4 Fost.) 344; *Rich vs. Flanders*, 39 N. H. 313; *Hoge vs. Johnson*, 2 Yerg. 125; *Vansant vs. Waddell*, Id. 260; *Brandon vs. Green*, 7 Hump. 130; *Society vs. Wheeler*, 2 Gallison, 189; *De Cordova vs. City of Galveston*, 4 Texas, 477.

In determining, then, the validity of a legislative act, something more is usually to be looked at, than its effect on past transactions. In fact, the test will be found to be, in general, not whether the particular statute is or is not retro-

spective in its language ; but whether it affects injuriously pre-existent rights of property. It must be observed, that the word "injuriously" is used here in its proper sense, as involving the idea of hurt or damage; not sanctioned or excused by any established rule of law or morals. For there are many ways in which rights of property may be abridged by legislative action, which, as possessing such sanction or excuse, is free from constitutional objection. Thus, in the exercise of what is commonly called the right of eminent domain, (for want of a better name,) the State, through its legislature, may impair, qualify, or destroy private property for a public benefit or to prevent a public injury. This right of eminent domain, which, like the right of self-preservation in individuals, is inherent in the very essence and constitution of civil society, precedes and sustains all private rights, towards which it may be said to stand in the relation of the keystone to the arch. Under this head may be classed laws which authorize the construction of public improvements, police laws which regulate the use of private property, so as to prevent detriment to the public morals or safety, tax laws, which control the application of private property to the support of the government, military laws, which sanction its appropriation to the general defence and security. With respect to these laws, and others of a like character, it is usually provided that compensation shall be made to the individual specially affected, but they are really justified as being the exercise of a paramount and pre-existent right, and therefore causing only *damnum absque injuria*. The same may be predicated of a great variety of legislative acts, which for purposes of general utility modify the incidents of private property; this, indeed, it is scarcely possible for

any public statute to avoid doing, in an indirect manner at least. Thus, a law which restricts the testamentary power, if future in its operation, is nevertheless perfectly constitutional, and yet it deprives every citizen, to that extent, of a right which he previously possessed as the owner of property.

These phrases, public use, general utility, and the like, must be considered as indefinite (and so far objectionable) forms of expression for the legitimate and declared objects of civil government, as established in the particular State. Any interference with private rights, except for the necessary attainment of these objects, is therefore, in so far injurious in the proper sense of the word, as being founded upon no paramount right. It may, of course, be also injurious, though professedly directed to that end, by reason of some express restriction in the constitution of the State upon an otherwise paramount right. Now, the power of the judiciary to declare a law void which interferes injuriously with private rights, on one or other of these grounds, may be considered as universally admitted under our system of written constitutions, with its division of political functions. But, if the decisions on this subject are examined with care, it will be found that judges have differed to a very embarrassing extent, as to the exact ground on which their authority is to be rested. This has probably arisen from the influence of two conflicting theories of political government which prevail in this country. One of these, carried to its fullest extent, claims for the State, acting through its different departments, absolute and despotic power, except so far as this is expressly limited by the written constitution. The other, carried to its fullest extent, declares the State to be no more than a political corporation, established

like any other corporation, for definite ends, however exalted in their character, and beyond these, having no just power on the rights of individual citizens. Between these two extremes there are, of course, a variety of shades of opinion. Those who hold by the despotic theory, generally look only to the express restrictions on the legislative authority. The others regard as well the general scope of the constitution, and the supposed purposes for which it has been established.

It has been already observed, that in most of the State constitutions there is no clause which in precise terms covers this subject. The admitted restriction on the legislative power over private rights, is sometimes inferred simply from two well-known provisions, which are usually placed in the bill of rights, as controlling not merely the legislature, but every function of government. *First*: That no man shall be deprived of his property, "except by the law of the land, or by the judgment of his peers," which means the same as the other form in which it is sometimes expressed, "by due process of law." Case of John and Cherry St., 19 Wend. 676; Brown vs. Hummell, 6 Barr, 86; Dale vs. Metcalf, 9 Barr, 110. *Second*: That private property shall not be taken for a *public* use without compensation, from which it is inferred that it cannot be taken in any case for a *private* use. See case of Albany street, 11 Wend. 151; Sadler vs. White, 34 Alab. 311; Clarke vs. White, 2 Swan, 549. An inference of the opposite character, that private property might lawfully be taken for a *private* use without compensation, was once drawn by Chief Justice Gibson from this very clause, see Harvey vs. Thomas, 10 Watts, 66, and as a mere matter of verbal logic, his conclusion was as just as the other. But it was unnecessary for the

decision of the case before him, and has been expressly reprobated in other cases Sharpless vs. The Mayor, 21 Penn. St. 167; Hays vs. Risher, 32 Penn. St. 177; Sadler vs. White, 34 Alab. 311.

It cannot be denied, however, that desirable as it may be to extract from these two clauses a sufficient prohibition against legislative interference with private rights, the task is one which involves a considerable latitude of interpretation. The first clause is simply copied in terms or substance from Magna Charta, where it originally stood as a limitation on the executive power, and it has never been supposed in England to apply practically, or otherwise than as the solemn enunciation of a principle of abstract justice, to the legislature. Or, if the question be confined to the mere construction of language, without regard to its historical derivation, we make no perceptible advance. Every statute is "the law of the land," unless restrained by some constitutional provision; and to convert a declaration that no man's property shall be taken *except* by the law of the land, into such a restriction, is a mere *petitio principii*, unless we are justified by *some other* constitutional principle, abstract or special, in giving to general words a limited and peculiar signification. It is plain, therefore, that this clause standing by itself, amounts really to nothing. Nor are we helped much more by the other clause which prohibits the taking of private property for *public* use without *due compensation*. From these naked words, three distinct and conflicting inferences may be drawn with equal logical propriety: (1.) That private property *can* be taken for a *private* use: (2.) That it *can* be taken for such use, only on compensation made: and (3.) That it *cannot* be taken for such use in any case. The first of these, which goes on the common

rule of construction, *inclusio unius exclusio alterius*, met, as has been noticed, the approbation of so sound a reasoner as Judge Gibson. The second, which operates by way of analogy, was adopted in *Brewer vs. Bowman*, 9 Geo. 37. The third, which applies the maxim *omne majus continet in se minus*, is the most common construction. It is sufficient to say, in respect to the last, that it also involves a *petitio principii*, unless we have first established that public and private uses stand to each other in the relation of *majus* to *minus*, for this particular purpose, since in themselves they are merely correlative and co-ordinate terms, mutually exclusive, and not in any obvious sense subordinated the one to the other. In other words, as it is contrary to the rules of logic to reason directly from particular to particular, we are thrown back on considerations of a more general character, which must be deduced otherwise than from the language employed. It is the ordinary case of statutory silence, which does not act as its own interpreter. And finally, as the clause is usually relegated to the bill of rights, it creates a restriction not only on the legislative power, but on the judiciary and the executive. The negative inference to be drawn from it, therefore, has no single effect, but must be applied distributively to the subjects of its positive prohibition. The result of this is, that it is, *a priori*, impossible to determine (even assuming that a negative inference is here admissible) which of the functions of government it really affects. To put this in a more tangible shape, if the clause provided that neither A, B, nor C, should take private property for public uses, what positive inference could be drawn from this that B could not take it for other uses?

But while a fair analysis of these special constitutional provisions seriously

affects the validity of the conclusions often drawn from them, the argument based on the general scope and purpose of our written constitutions, as usually framed, possesses, it is submitted, much greater strength than is sometimes attributed to it. It is not necessary for its application that we should adopt either of the extreme theories as to the nature and extent of the powers vested in the State, which have been noticed above. Whether these powers, taken in the aggregate, are absolute or limited, their functions have been vested in three distinct branches of government. By this division of powers the function of the legislature is as much restricted to its appointed sphere as that of the judiciary, or of the executive. The fallacy lies in attributing to the first, in the absence of any express constitutional prohibition, the same absolute and unconditioned power, which is supposed by some to be vested in the State itself, as an abstract body. This has naturally arisen from our familiarity with the theory of the English Parliament, which does rightfully exercise that power to its fullest extent. But here a determination of what constitutes the true sphere of legislative action, must precede the discussion of the validity of any particular statute. That this is a task of very great difficulty there can be no doubt; but it is an imperative one, unless we are content to allow the legislature to convert itself into a practical tyranny.

For the present purpose, it is sufficient to assume, as beyond dispute, that the constitutional function of the legislature cannot coincide, to any material extent, with that of the judiciary; and, therefore, that to establish the possession of a particular power by the one is to deny it to the other. Now, one of the primary duties of the judiciary is to determine, upon

any given state of facts, what rule of law is to govern the rights of individual citizens. That this is generally done in the course of litigious proceedings, is an accident dependent on the mode in which the function is exercised. The rule itself, once ascertained, binds not merely the parties to the suit, but the community at large. But at any one time, and with reference to the same state of facts, there can be only one rule of law applicable; what that is may be more or less difficult of discovery, may sometimes be mistaken, but in its essence it is a pre-existent absolute fact, which can be no more made otherwise than it is, by human agency, than any other fact belonging to the past. The function of the judiciary is therefore the declaration of pre-existent law, and it is, *ex necessitate*, an exclusive one, for if any other body could exercise the same function, then there might be, as to the same state of facts, two conflicting rules of law, either co-existent, which is absurd, or that declared by the judiciary being abrogated by the other, which would make the judicial power a subordinate branch of government, which it is not.

Again, legislative power, in the proper sense of the word, consists in the authority to establish general rules of civil conduct, and this can of necessity apply only to future transactions. For the rights arising out of any past state of facts, must have become fixed by reference to some then existing rule of law. Now, those rights can only be destroyed in one of two ways: either by abolishing the existence of the rule, of which they are the consequence, as a *historical fact*, which is impossible: or by preventing their exercise by superior force, which would not be an act of legislation, but of arbitrary power. In other words, a statute which professes in terms to take away a pre-existent right, does

not prescribe a rule of civil conduct as such, nor establish any principle to govern the action of the individual: for the action or conduct by which he acquired the right, being a part of the past, is now irrevocable. Such a statute is not really a law, but only an expression of the will of a majority in the legislature, under the pretended form of law. If that majority be not in fact restricted to the mere function of legislation, but possesses arbitrary power, as is to a great degree the case with the British Parliament, and was in every sense so with the French revolutionary convention, such an expression of will, whether calling itself a law, or a decree or an edict, would be valid and efficacious, however objectionable on moral grounds. But with us, to affirm the possession of arbitrary power by the legislature beyond the limits of its special function, is impossible. If it were so, the judiciary and the executive would cease to be co-ordinate branches of government. Even if we can attribute such power to the State in its original and organic character, nevertheless it has chosen by the constitution to delegate it to and divide it between several departments, and it would be as much a contradiction in terms to speak of three arbitrary powers co-existing in the same State, as of three infinite quantities occupying the same space. One must, *ex vi termini*, exclude or subordinate the rest.

To sum the argument up — Every statute which interferes with a vested right, must do so either by the enunciation of a rule of law to be applied to a pre-existent state of facts, which would be an encroachment on the judicial power; or by the arbitrary destruction of the right itself, which could never be a legislative act. In the one case, it would be the excessive exercise of an existing power: in the other, it would

be the assumption of a power which did not exist. In either case, the judiciary, in the exercise of its constitutional functions, would be bound to declare what was the proper rule of law, and to enforce practically the rights which proceeded therefrom, without regard to such an unconstitutional expression of the legislative will.

This mode of considering the general question, besides what seems to be its greater logical accuracy, possesses several advantages over that which claims to deal only with the construction of the two special clauses above referred to. In the first place, it deprives those clauses of the isolated and negative character which they would otherwise possess. It enables us to define "the law of the land," to be that rule of law which the judicial power shall declare to be applicable to any given state of facts. It further explains the reason for an express prohibition against taking private property for a public use without compensation. For every private right, as has been already said, is, from the very constitution of society, subject to the paramount and pre-existent right of the State to modify or even destroy it, when the public necessities, the attainment of the primary ends of government, shall require it. The exercise of this paramount right by the legislature would not be an encroachment on the judiciary, inasmuch as it would not be the application of a new rule of law to a previous state of facts, but only a declaration of the manner in which a pre-existent rule is applied to a new state of facts. As then, a law taking property for a public use would not be objectionable on any general constitutional ground, it was proper to qualify the right by a declaration, which abstract justice required, that the individual should in all cases be compensated for his sacrifice for the general good.

Again, the construction contended for will justify more clearly an universally admitted exception to the unconstitutionality of retrospective laws, in favor of statutes which merely operate on "the remedy," as it is called. The procedure established by law to enforce a right, is no part of the right itself, which often exists without any practical remedy, and most often without any need to call on the State for active assistance. This procedure is essentially of a transitory and prospective character; it is only the performance of the duty of the State to give an efficient protection to civil rights. So long as that duty is substantially performed, the individual has no cause to complain, and the mode of its performance, as a matter belonging to the future, may be varied from time to time, at least before it has incorporated itself with a right in proceedings actually instituted.

Finally, a number of exceptional and at first sight, anomalous cases, some of which will be presently mentioned, can by this means be co-ordinated and brought under the dominion of intelligible principles. Admitting that the main test of the constitutionality of a retrospective law, is, whether it avoids interference with the judicial power, it is plain that laws which merely confirm antecedent rights, remove obstacles to their just exercise, supply defects in the procedure by which they are to be established, and in general terms substitute an adequate for an inadequate remedy for their enforcement, cannot be obnoxious to objection on this ground. It is more difficult to determine to what classes of antecedent rights those principles can properly be applied. It certainly may, to those which would have a clear legal existence but for the positive interference of some rule of public policy or convenience, or but for the mistake or accidental non-observance of

such a rule. It may also apply to some cases of rights resting in moral obligation alone, such as those arising out of domestic relations existing *de facto*, though not lawfully established, an example of which may be found in the preceding decision. But there is a large and undefined class of cases, which deal with rights which are purely *in foro conscientiae*, where it must be admitted that it is often very hard to discover any satisfactory grounds of decision. To take one man's property and give it to another, merely because we think he deserves it, may suit the character of a beneficent khalif, but not that of a civilized legislature; and yet there are reported cases which almost seem to go to that length. It would be impossible, however, from want of space here, to enter more fully on this subject. It is sufficient to indicate lines of distinction, which may be readily followed out by the student for himself.

Having thus stated in a general manner the principles upon which the constitutional question has been discussed, with more or less of clearness and consistency, we shall briefly consider some of the instances in which they have been practically applied by the decisions, among which there is fortunately much greater uniformity of result than of theory.

It may be taken to be settled, on whatever ground, that vested rights of property cannot be arbitrarily destroyed or affected by the legislature. *Dash vs. Van Kleeck*, 7 Johns. 505; *Officer vs. Young*, 5 Yerg. 822; *Hoke vs. Henderson*, 4 Dev. 15; *Allen vs. Peden*, 2 Car. L. Rep. 63; *Dunn vs. City Council*, Harper's Law, 199; *Woodruff vs. State*, 3 Pike, 302; *Oriental Bank vs. Freese*, 18 Maine, 112; *Austin vs. Stevens*, 24 Maine, 529; *Wright vs. Marsh*, 2 Greene, Iowa, 118; *Houston vs. Bogle*, 10 Ired.

504; *Holden vs. James*, 11 Mass. 408, *Lamberton vs. Hogan*, 2 Barr, 24. And as this cannot be done directly, neither can it be done indirectly, as by the express repeal of a statute under which those rights are held. *Benson vs. Mayor, &c.*, 10 Barb. 223. Or through a legislative construction of the statute by a subsequent declaratory law. *Hunt vs. Hunt*, 37 Maine, 384; *Houston vs. Bogle*, 10 Ired. 504; *McLeod vs. Borroughs*, 9 Georgia, 216; *Wilder vs. Lumpkin*, 4 Geo. 212; *Dash vs. Van Kleeck*, 7 Johns. 508; *Ogden vs. Blackledge*, 2 Cranch, 272; *West Branch Boom Co. vs. Dodge*, 31 Penn. St. 285; *Gordon vs. Ingram*, 1 Grant's Cas. 152.

The most obvious instance of interference with vested rights would be an act which in terms took away one man's property to give it to another. It is scarcely conceivable that such a statute could be deliberately passed, without some supposed excuse or palliation; but if it were, it would indisputably be disregarded by the judiciary. *Jackson vs. Ford*, 5 Cowen, 350; *Wilkinson vs. Leland*, 2 Peters. 658; *Allen vs. Peden*, 2 Carolina Law Rep. 63; *Hoke vs. Henderson*, 4 Dev. 15; *Dunn vs. City Council*, Harper, 199; *Bowman vs. Middleton*, 1 Bay, 254; *Woodruff vs. State*, 3 Pike, 305; *Hoye vs. Swan & Lessee*, 5 Maryl. 244; *White vs. White*, 5 Barb. 484; *Austin vs. University of Pennsylvania*, 1 Yeates, 260; *Van Horne's Lessee vs. Dorrance*, 2 Dallas, 304, 310; *Pittsburg vs. Scott*, 1 Barr, 314; *Lamberton vs. Hogan*, 2 Barr, 24; *Brown vs. Hammell*, 6 Barr, 86. But the same effect is often produced by legislative acts which have an apparent justification in the reasons on which they are founded, and in the ends which they propose to attain. Now, if we eliminate those cases in which the property is taken for a public use, or by way of punishment for some alleged

offence, which are governed by distinct constitutional provision, we have left those in which it is taken simply for a private use. This last class of cases, with which alone we have to deal, may again be divided into those where the right of property affected is absolute and complete, and those where it is imperfect, or qualified by some antecedent duty or obligation enforced by the statute, or where, though perfect in itself, it happens to be vested in some one not legally capable of exercising the usual and necessary functions of ownership.

Taking this division as sufficiently accurate for the present purpose, it may safely be said, in the first place, that an act which deprived one man of an absolute and complete right for the benefit of another, has rarely been sustained, however consonant it might seem to be under the circumstances with abstract justice. Thus, a statute which provides that the executors of a tenant for life shall be entitled to claim against the remainder-men for the value of permanent improvements made by the former, is unconstitutional so far as it applies to improvements made before its passage. *Austin vs. Stevens*, 24 Maine, 529; see *Society vs. Wheeler*, 2 Gallison, 189. So of a law which authorizes towns to make ordinances giving liberty to all their inhabitants to pasture their cows on public highways, the soil of which belongs to private individuals. *Woodruff vs. Neal*, 28 Conn. 165. So in some of the States, laws authorizing the taking of land for private ways, mill dams, and the like, have been held unconstitutional. *Taylor vs. Porter*, 4 Hill, 140; *Clack vs. White*, 2 Swan, 549; *Sadler vs. Langham*, 84 Alab. 311; see *Brewer vs. Bowman*, 9 Georgia, 37; *contra Hickman's Case*, 4 Harr. Del. 581. But in Pennsylvania, lateral railroad laws have always been supported; in the later cases on the

ground that, being intended for the development of the mineral and other resources of the State, the taking of the land under such acts was really for a public use. *Harvey vs. Thomas*, 10 Watts, 68; *Harvey vs. Lloyd*, 8 Barr, 381; *Shoenberger vs. Mulholland*, 8 Barr, 154; *Hays vs. Risher*, 32 Penn. St. 169. It must be admitted, however, that the line of distinction between public and private uses, if this qualification were generally adopted, would be exceedingly thin.

It is not material, in the application of the general principle, whether the right of property affected was originally created by contract or other act of the party, or through the operation of some general law which at the time regulated the descent or transmission of property. Where the title to land has become vested by the death of an intestate, in his heirs, according to the then existing law, it can no more be divested by any general or special legislation than if they had taken by purchase. Thus, where a will is void by reason of a non-compliance with some statutory provision with respect to the mode of its execution, it cannot be validated after the death of the testator, by a confirmatory act, so as to vest the property in the devisees. *Greenough vs. Greenough*, 1 Jones, 489; *McCarty vs. Hoffner*, 28 Penn. St. 567. So where the act makes that devisable which was not devisable at the testator's death, such, for instance, as rights of entry for condition broken. *Doe d. Southard vs. Central R. R. of New Jersey*, 2 Dutcher, 18; see *Mullock vs. Souder*, 5 Watts & S. 198. So where a particular devise is inoperative, by reason of incapacity in the devisee, as in the case of a gift to an unincorporated institution for charitable purposes, a statute vesting the property in trustees for those purposes is void. *Green vs. Allen*, 5 Humph. 170. The same principle applies to statutes legitimating

bastards, which, though valid during the lifetime of the putative parent, are void if passed after his death, so far as they would affect the succession to his property. *Norman vs. Heist*, 5 Watts & Serg. 171; and it has even been held that it is not material that the act by which such a result is attempted, is one which only professes in general terms to validate past marriages by a legislative construction of a previous statute. *Hunt vs. Hunt*, 37 Maine, 337. The status of legitimacy or illegitimacy is determined by the death of the parent, and cannot be subsequently affected. *Id.* But this last decision is in conflict with the case of *Goshen vs. Stonington*, 4 Conn. 209, which will be subsequently referred to.

To this class may also be referred statutes affecting the rights of property arising directly from the relation of husband and wife. It has therefore been held, in some cases, that the "Married Women" acts of several of the States, cannot be constitutionally applied to the rights of a husband in the real estate or in the personal estate of his wife, whether in possession or action. *Norris vs. Boyea*, 8 Kern. 288; *Westervelt vs. Gregg*, 2 Id. 202; *Holmes vs. Holmes*, 4 Barb. 295; *White vs. White*, 5 Barb. 484; *Le-fever vs. Witmer*, 10 Barr, 505; *Bachman vs. Christman*, 28 Penn. St. 162; *Burson's Appeal*, 22 Id. 166; *Stehman vs. Huber*, 21 Id. 260. In other cases a somewhat different doctrine has been maintained. Thus, it has been held that the legislature may constitutionally divest the contingent right of a husband in the chose in action of his wife. *Clarke vs. McCreary*, 12 Sm. & M. 347. And so it has been held, that though a statute cannot take away the vested rights of dower or courtesy, it can those which are merely inchoate. *Strong vs. Clem*, 12 Ind. 37. These cases cannot, how-

ever, be properly said to be conflicting, inasmuch as the character of the marital rights at common law in the different States varies very materially. Thus, where, as in Pennsylvania and elsewhere, the right of a husband over the choses in action of his wife is an immediate one, capable of positive and efficient exercise at any time, and in any substantial manner, and only subject, if not exercised, to the contingency of the survivorship of the wife, (see *Hill on Trustees*, 3d Am. Ed. 619, note,) or where the title by dower or courtesy is one which actually and as an estate in the land commences in the lifetime of the parties, it would be difficult to maintain the constitutionality of a law which simply abrogated their existence. But where, as in other States, the marital rights become vested only at the death of the husband or wife, a different doctrine might very properly obtain.

It may be observed, before leaving this branch of the subject, that where the natural succession to property fails by default of those who, by reason of blood or affinity, fall under the usual designation of heirs, the right of the State by way of escheat is one partaking of the nature of sovereignty, which cannot be bound by any antecedent undertaking. It therefore seems that where the State, by a general law, makes a specific disposition of property to which it might, under such circumstances, become entitled, that disposition may afterwards be changed in any particular case before the right under the general law has become vested by office found. This seems to follow from the case of *Gresham vs. Rickenbacker*, 28 Georgia, 227, though the decision there is somewhat rested on the language of the statute involved.

Passing now from the cases in which the right affected was previously absolute and complete, we may consider

briefly those in which it was already qualified by some antecedent duty or obligation, which the obnoxious statute is intended to enforce. Of course, it must be assumed that this duty or obligation was one for which originally the law furnished no practical remedy, else the statute would be a mere matter of supererogation.

Under this head may be classed those cases where, by contract or otherwise, and according to the very intention of the parties, a perfect legal right would have been created, but for an accidental disregard or omission of some formal statutory requisite to its juridical establishment. Thus, statutes validating deeds, the acknowledgments of which have been defectively certified by the officer taking them, have been frequently held to be constitutional, even as against married women and their heirs. *Barnet vs. Barnet*, 15 Serg. & R. 78; *Tate vs. Stoolfoos*, 16 Serg. & R. 85; *Watson vs. Mercer*, 8 Peters, 88, aff'd S. C. 1 Watts, 330; see observations in *Menges vs. Dentler*, 83 Penn. St. 499; *Chestnut vs. Shane's Lessee*, 16 Ohio, 599; *Dulany vs. Tilghman*, 6 Gill & Johns. 46. After an express decree or judgment of a court, indeed, it has been held, in some cases, to be different, as the matter has then become *res judicata*. *Barnet vs. Barnet*, 15 Serg. & R. 78; *Gaines vs. Catron*, 1 Hump. 84; *Garnett vs. Stockton*, 7 Hump. 84; but in *Watson vs. Mercer*, *ut supr.*, it was expressly decided that the validating act might be applied to a subsequent ejectment between the same parties; and see *Satterlee vs. Matthewson*, 16 Serg. & R. 169, aff'd 2 Peters, 413, to the same effect. The same rule has been applied to statutes intended to cure a mistake in the deed of a feme covert, as the omission of her name in the granting part. *Goshorn vs. Purcell*, 11 Ohio St. N. S. 644. Or to validate the

defective exercise of a power. *State vs. The City of Newark*, 8 Dutch. 196. Or to set up and confirm leases and other contracts void as being against some special rule of public policy. *Satterlee vs. Matthewson*, *ut supr.*; *Hess vs. Werts*, 4 Serg. & R. 356; *Savings Bank vs. Bate*, 8 Conn. 505; *Savings Bank vs. Allen*, 28 Id. 102. The same may be said of statutes confirming irregular executions in favor of a purchaser. *Mahler vs. Chapman*, 6 Conn. 54; *Beach vs. Walker*, Id. 190; see *Underwood vs. Lilly*, 10 Serg. & R. 101; *McMasters vs. Comm.*, 8 Watts, 294; *Willard vs. Harvey*, 24 N. H. 810. Though where a sheriff's sale is absolutely void, so that no title whatever passes, there being no contract or other obligation resting on the defendant, a confirmatory act will be invalid. *Dale vs. Medcalf*, 9 Barr, 110; *Menges vs. Dentler*, 83 Penn. St. 495. And, finally, the general principle above stated has been applied to acts confirming marriages *de facto*, really intended to be solemnized by the parties, but which, by mistake or ignorance of some statutory regulation, are void in law. *Goshen vs. Stonington*, 4 Conn. 209. This, it is true, was only a settlement case; and it appears, moreover, to be opposed by *Hunt vs. Hunt*, 87 Maine, 334. But it would seem that the doctrine of *Goshen vs. Stonington*, may be supported on the ground that the forms prescribed by law for the solemnization of marriage must, in general, be considered not as belonging to the *substance* of the contract, but as establishing the legal mode of proving it; and that if the parties really meant marriage, and cohabited together in good faith under that ostensible relation, an act which supplies the defect of form should be treated as affecting only the *evidence* of a right, and not the right itself. This distinguishes the case from that of acts legitimating bastards, where

the parents never actually contemplated marriage.

The last class of cases to which reference need be made on the present occasion, is that where a perfect legal right to property exists in persons who, by reason of some disability, such as that of infancy, coverture, or lunacy, are incapable of exercising the ordinary functions of ownership themselves, or of consenting to their vicarious exercise by others. Statutes which, unless such circumstances authorize the sale or pledge of the property in order to raise money for the necessities of the real owner, or because the property is burdensome or unproductive, have very frequently been passed, and almost as often sustained by the courts, at least where the application of the money produced, as directed by the statute, will not otherwise alter the rights of the party. It is plain that this does not attach any new or different incidents to the right of property; it merely removes a temporary bar to its complete and beneficial enjoyment. The disabilities we have above referred to are, to a great degree as to their substance, and entirely so as to their extent, the creations of positive law; and they are qualifications not of a right, but of the means of its exercise, introduced from motives of general policy, or for the protection of the individual. Their withdrawal or suspension in any particular case, when the reason of their enforcement has ceased, is, therefore, plainly no interference with the judicial power, and it is, moreover, a proper legislative act, for it is a mere modification of previous legislation. This power of supplying the defective capacity of its citizens, indeed, is inherent in the State, and constitutes what, in the Roman law, was called its *auctoritas*. This in the true sense of the word is that which *auget*, i. e., which

increases or supplies, the juridical power or *status* which is wanting in one not *sui juris*. The absolute necessity of the existence of such a function somewhere is apparent, and though it is usually delegated in a qualified manner to the guardian, husband, or committee of the person affected, it is not a natural but a derivative power; and if derived, as it must be, from the State alone, it proves the antecedent existence of the function itself as a branch of the legislative power.

The questions which have arisen under this head of our subject are of much importance, and they have given rise to some conflict of decision. Our limits, however, will prevent our entering upon them here; indeed they deserve of themselves a special study. It is sufficient to say that the general principle, as we have just stated it, will be found to be substantially supported by the following among other authorities: *Eslep vs. Hutchman*, 16 Serg. & R. 485; *Norris vs. Clymer*, 2 Barr, 277; *Sergeant vs. Kuhn*, Id. 398; *Kerr vs. Kitchen*, 17 Penn. St. 488; *Martin's App.*, 23 Id. 437; *Cochran vs. Van Surlay*, 20 Wend. 365; *Leggett vs. Hunter*, 19 New York, 445; *Fowle vs. Finney*, 4 Duer, 104; *Blagg vs. Miles*, 1 Story, 426; *Rice vs. Parkman*, 16 Mass. 326; *Davis vs. Johannot*, 7 Metcalf, 388; *Snowhill vs. Snowhill*, 2 Green Ch. 20; *Spotswood vs. Pendleton*, 4 Call, 514; *Dorsey vs. Gilbert*, 11 Gill & Johns. 87; *Nelson vs. Lee*, 10 B. Monr. 495; *Carrol vs. Olmsted*, 16 Ohio, 251; *Doe vs. Douglass*, 2 Blackf. 10; *Daws vs. State Bank*, 7 Ind. 816. In *Wilkinson vs. Leland*, 2 Peters, 627, a statute confirming the sale of property of infant heirs by an executrix, in order to pay debts of the decedent, was held valid. But this was under an act of the Legislature of Rhode Island, which, at the

tune, had no regular constitution, and the decision, as the enunciation of a general principle, was dissented from, in *Jones' Heirs vs. Perry*, 10 Yerg. 70, where a similar act was held void, on the ground that the legislation, not being for infant's benefit, but for the payment of debts to be ascertained, it was an exercise of judicial power. Where the persons, whose land is to be sold, are *sui juris*, however, the reason, and, therefore, the right, of legislative interference

ceases, unless in cases where their assent is expressly shown: *Ervine's Appeal*, 18 Penn. St. 256; *Schoenberger vs. School Directors*, 32 Penn. St. 34; *Kneass' Ap.*, 31 Id. 87; *Powers vs. Berger*, 2 Selden, 358. Though after the lapse of a great number of years, and acquiescence in a sale made under such an act, the assent of such persons may be presumed, at least in a controversy between strangers: *Fullerton vs. McArthur*, 1 Grant's Cas. 232. H. W.

In the Massachusetts Supreme Judicial Court, January Term, 1861.

LE BRETON vs. PEIRCE, THE OWNERS OF PROPERTY, ETC.

If the owners of property have intrusted it to an agent for a special purpose, and the agent, in violation of his duty, has unlawfully consigned the same to be sold, with directions to remit the proceeds to a private creditor of his own, and such creditor, upon being informed by a letter from the consignee of the consignment of the property and directions in reference to the same, manifests his assent thereto by unequivocal acts, and the property is sold by the consignee, and bills of exchange, payable to the agent's creditor or his order, are purchased with the proceeds, and remitted in a letter addressed to him, in compliance with the directions, and the creditor, after receiving notice of the intended remittance, and after manifesting his assent thereto, and after the remittance is actually made, but before it is received, learns for the first time of the manner in which the agent became possessed of the property, and of his wrongful acts in reference to it, the original owners of the property cannot maintain an action for money had and received against such creditor, to recover the amount collected by him upon the bills of exchange.

This case is reported at length in the October number of the *LAW REGISTER*, to which we must refer the reader. The Court, *MERRICK, J.*, in giving judgment, put the case mainly upon the two points referred to in the following note, which was intended to have been published in the same number with the case.

One of the questions involved in this case is of great interest with business men; and it seems almost incomprehen-

sible how there should have been so much conflict in the decisions of the courts in this country in regard to it.

It probably may have arisen from not clearly discriminating the precise state of facts upon which the different views found themselves. This will readily be perceived by carefully examining the opinions of the different judges. But we think something of this embarrassment may be got rid of by careful classification.

I. Where the negotiation of the note or bill, as between debtor and creditor, is understood to operate either as conditional payment, or to create an expectation between the parties, that the collection of the principal debt shall be delayed until the time of payment of the collateral security, there can be no question that, upon principle and authority, the creditor must be said to take the paper upon full consideration, and in the due course of business. The conflict in the cases seems to arise upon the question, what is *implied* by accepting a note or bill, on time, for a pre-existing debt then due?

1. This will depend, to some extent, upon commercial usage, and the ordinary course of doing business, and the natural implications, from the mere act of accepting the note or bill, and is, therefore, matter of fact, in part, at least. The implication, as matter of fact, is different, in some respects, whether the new note or bill is for the precise amount of the existing debt, as in *Michigan State Bank vs. The Estate of Leavenworth*, 28 Vert. R. 209; or for a different sum, either more or less, and especially when it is for a less sum. Where the new security is for the precise sum of the debt, and is payable on time, there is, in fact, a very strong implication that the creditor will wait until the maturity of the new security. And in that view the cases all agree that the new security is taken for value, and that all equities in favor of other parties will be excluded. And a

similar implication results where the new security is for a larger sum than the existing debt, as in *Atkinson vs. Brooks*, 26 Vert. R. 569.

2. But where the security is of a different character from the original debt, as where the creditor takes a mortgage from the debtor for the payment of the sum due in six months, it is not understood there is any implication of a contract to delay the collection of the debt of other parties: *United States vs. Hodge*, 6 How. U. S. R. 279.

3. And where the new security is not given in lieu, or on account of the existing debt, but as a mere pledge, the title of the new security remaining in the debtor, and not passing to the creditor, thus making the creditor the mere trustee or agent of the debtor for the collection of the new security, to be applied, when collected, upon the existing debt, between them, as was held in the case of *Austin vs. Curtis*, 31 Vt. R. 64: the cases all agree that there is no implied undertaking not to collect the existing debt in the mean time.

The following cases may therefore be regarded free of doubt, both upon principle and authority:

1. If the collateral is given in security at the time the debt is created, and as an inducement for the credit, and is a negotiable instrument, and still current, and is, in fact, negotiated to the creditor, so as to make him a party to the paper, and impose upon him the duty of demand and notice, according to strict commercial usage, the cases all agree, so far as they have comprehended the questions involved, that all equities of third parties are excluded: *Chickopee Bank vs. Chapin*, 8 Met. R. 40; *Griswold vs. Davis*, 31 Vt. R. 390; *Palmer vs. Richards*, 1 Eng. L. & Eq. R. 529. The declaration in *Williams vs. Little*, 11 New H. 66, and many other cases to the

contrary, is certainly not maintainable upon any fair view of the question, in that precise form of it.

2. If the collateral is not so negotiated as to make the creditor a party to the paper, and thus impose upon him the duty of making demand and giving notice, but making the creditor the mere agent of the debtor for the collection of the new bill or note, there is no ground of excluding equities in other parties, unless the creditor negotiates the security thus left in his hand to some third party, for value and while current: *Palmer vs. Richards*, 1 Eng. L. & Eq. R. 529; *Atkinson vs. Brooks*, 26 Vert. R. 569; *De La Chaumette vs. Bank of England*, 9 B. & C. 208; *Allen vs. King*, 4 McLean R. 128.

In such case the debtor, it would seem, may recall his collaterals, as the creditor, being his agent, is under his control. But this is certainly not the ordinary case of collateral security.

3. Where there is either an express contract with the creditor, that he shall, in consideration of the indorsement of the new bill, or note, as collateral, delay the collection of the existing debt until the maturity of the new security; or where such an understanding is reasonably to be presumed, from the facts and circumstances attending the transaction, and the delay is thereby obtained, there is no ground of question, since they stand upon the same footing in point of principle, as if an advance were made upon the credit of the new security: *Okie vs. Spencer*, 2 Wharton, 253; S. C., 2 Am. Lead. Cas. 232, and numerous cases there cited. These cases are so obvious upon principle, to the mind of all lawyers, that it would be a useless labor to attempt to render them more perspicuous. What is self-evident thereby becomes incapable of simplification, since

there is nothing more obvious by which it can be illustrated.

II. In coming to the inquiry, what is the precise legal implication, from the mere fact of receiving a negotiable security without surrendering any of the former securities for an existing debt, we encounter more perplexity.

1. This will depend, undoubtedly, to a great extent upon the course of doing business, and the commercial usages of the place. From all we can learn of this commercial usage in England, judging both from the reported cases and the elementary works, we infer that each new security is there credited as so much cash at the time it is received, and is charged to the debtor, in case of dishonor, with the addition of expenses attending the protest: *Poirier vs. Morris*, 20 Eng. L. & Eq. R. 103; *Bosanquet vs. Dudman*, 1 Starkie, 1. In this last case Lord Ellenborough said, "that whenever the acceptances exceed the cash balance the plaintiff holds all the collateral bills for value." Ex parte Pease, 19 Vesey, 25. In this mode of transacting business, the new notes, or bills, from time to time remitted to the creditor by his debtor, are, upon receipt, passed to his credit, and thus virtually discounted. This, we apprehend, is the usual course of doing business, in this country, where one has an open account with banks or bankers, and not unfrequently with brokers. How far it obtains with merchants it is not very certain, depending upon the nature and the amount of the dealings. But whenever the business is conducted in this form, there would be no difference as to the right of the creditor to hold the collaterals, whether they were taken in payment, or as security, or whether any advances in money were made at the precise time the collaterals were negotiated, since passing them to the credit of

the debtor as so much money, is strictly advancing the money upon them. This, we apprehend, is the true explanation of the reason why we find so little said, in the English cases, or treatises on bills and notes, in regard to these distinctions, which occupy so much space in our own reports. The case of *The Bank of the Metropolis vs. The New England Bank*, 1 How. U. S. R. 234, is precisely of this character, and the creditor was allowed to hold the collaterals free from all equities.

2. But in whatever mode the business is transacted, if we look carefully into the true principles involved, we shall come much to the same result. It has always seemed to us that most of the controversy upon this subject has grown out of the different sense in which the terms used are understood. If the term "collateral" is understood to import that the bills thus held are not taken on account of the existing debt, but only to be held until due, and, if paid, the amount to be applied, and, in the mean time, 'he creditor assumes no responsibility in regard to them, except as the mere agent of the debtor for collection, there could be no ground of claim that any property passed, or that existing equities in former parties were extinguished. The English cases in bankruptcy show very clearly that, in such cases, the title in the bills does not pass to the assignee, but may be retained by the correspondent: *Ex parte Pease*, 19 Vesey, 25; *De La Chaumette vs. The Bank of England*, *supra*.

3. But we apprehend this is not the ordinary acceptance of the term *collateral*, or collateral security; for it is no security at all. The etymology of collateral security indicates that it is something running along with, and, as it were, parallel to, something else, of a similar character. It is collateral to the origi-

nal indebtedness. It is, of course, a security, but it need not be in the precise form of the original. A bond may be secured by a collateral indebtedness in the form of a bill or note, and *vice versa*, and the collateral will always include other parties. But as far as the debtor is concerned, they are holden for the payment of the debt, and the creditor equally at liberty to pursue all in all legal modes, unless there is some express or implied restriction upon the title of the collaterals.

In this sense the title passes, by the negotiation of a bill or note, as collateral, the same as if the money were advanced. The only difference is, that this form is dispensed with, and the creditor retains his original security. Ordinarily, the collateral may not bind the same parties as the original security, or not all of them. In such cases the creditor will wish to retain the original, so as to lose none of his security. All that the word collateral imports is, that there is a prior or existing debt, and the collateral depends upon that, stands or falls with it, so far as the creditor is concerned.

4. But if the party takes the indorsement of a bill of lading, or of a bill of exchange, or note, he acquires no different rights as to the parties to these new instruments, whether he takes them in payment, or as collateral to an existing debt. In either case he becomes a party to the transaction or contract to the fullest extent, and, in the case of negotiable instruments, is bound to pursue the law merchant in making demand and giving notice, at the peril of making them his own, in actual exoneration of the party negotiating them.

5. In such cases it can be of little importance whether the original debt is treated as extinguished or not, since, if the debtor negotiate the note or bill, by

his own indorsement, which is the usual course, he is bound by such indorsement, and the double bond is of no essential importance. And if the creditor do not take steps to charge his debtor, as indorser, he makes the collateral his own in payment of his debt, and the result is the same, whether he is bound doubly or singly, since the release extinguishes both or one, as the case may be.

6. The mere giving of a negotiable note or bill for an existing debt, is only conditional payment, in any case, by the general law merchant, unless there is an express agreement that it shall extinguish the original debt. Upon the dishonor of the new note or bill, the creditor may sue the original debt, or the indorser of the new bill or note, at his election, so that the note or bill is but a collateral in any case, unless there is some special contract, or some special usage, as in the New England States, that the acceptance of the new note, or bill, shall, *prima facie*, extinguish the debt. These propositions are familiar, and scarcely require specific authority for their support. The cases are carefully collated, in 2 Am. Lead. Cas. 241-273.

III. Most of the conflict in the American cases, and all the English cases, will be readily reconciled by reference to the foregoing distinctions. And those anomalous cases in the American States, which will not come into these distinctions harmoniously, have been decided without properly apprehending the true principles involved, and must be left in their appropriate solitude until they are either abandoned, or else the course of business, or the principles of natural justice become so far modified, that they can be adopted by others.

1. In the case of Poirier vs. Morris, *supra*, Crompton, J., said: "Whether the bill was a collateral security, or whether it had the effect of suspending the pay-

ment of the antecedent debt, is quite immaterial." And Lord Campbell said: "There is nothing to make a difference between this and the common case, where a bill is taken as security for a debt, and in that case an antecedent debt is a sufficient consideration." And in Percival vs. Frampton, 2 C. M. & R. 180, Parke, B., said: "If the note were given to the plaintiffs as security for a previous debt, and they held it as such, they might be properly stated to be holders for valuable consideration." The same rule is recognised in numerous other English cases: Heywood vs. Watson, 4 Bing. R. 496; Bosanquet vs. Forster, 9 C. & P. 659; Same vs. Corser, ib. 664; 2 Am. Lead. Cas. 250, 251. The rule is thus stated in the work last quoted, which has almost become a book of authority in the American courts. "The result of the English cases would seem to be, that accepting a note or bill payable at a future day, on account of a pre-existing debt, will suspend the debt until the note reaches maturity: Byles on Bills, 6 ed. 304." "The law is clear," said Lord Kenyon, in Stedman vs. Groch, 1 Esp. R. 4, "that if in payment of a debt the creditor is content to take a bill or note payable at a future day, he cannot legally commence an action for his original debt, until such note or bill becomes payable, and default is made in the payment." And the cases all agree that no recovery can be had in any case, upon the original debt, where the collateral, given in security, was indorsed while current, and is still outstanding: Price vs. Price, 16 M. & W. 232, 248. And in every case where the party accepts a collateral as security for a previous debt then due, there is no implied obligation not to negotiate the collateral before maturity. In nine cases out of ten that is done, among business men immediately, for the purpose of raising the

money, which should have been paid when the debt matured; so that the collateral is always received for the ease of the debtor, and it is not ordinarily received as a mere pledge, so that negotiating it would be a breach of good faith. On the contrary, the security, being negotiable, passes as money, and operates as payment conditionally, and is expected to be passed into the market at once.

All that is implied, then, by it being collateral, is, that there is no agreement or implication that the original debt is extinguished. The creditor intends to hold on to his original debt and all other securities. The new security, then, is collateral to the previous debt; but the new security, as between the parties to it, and the creditor, is not affected by it being collateral to the previous debt, any differently from what it would be if it were received in extinguishment of it. It is negotiated in the fullest manner, and subject to the law merchant, and with no restrictions upon its further negotiation. We think, therefore, that the English courts have taken the true view in saying that such paper passes for value, and in the ordinary course of business, and excludes all existing equities, without regard to the understanding, agreement, or implication, as matter of fact, that the creditor should delay the enforcement of the existing debt until the maturity of the new security. And that they are also right in saying, that it makes no difference in principle, or legal effect, whether the existing debt is extinguished or not, or whether the original evidence of debt, or the existing securities, are surrendered or not: *Kearslake vs. Morgan*, 5 Term R. 513; *Baker vs. Walker*, 14 M. & W. 465; *Belshaw vs. Bush*, 11 C. B. 191, 200; *Ford vs. Beech*, 11 Q. B. 852, 873. These transactions, indorsing negotiable securities on account of previous debts, without

special agreement as to the effect, are there treated as "necessary exceptions to the general rules of law, in favor of the law merchant." This rule has been adopted in this country by the national tribunal of last resort: *Swift vs. Tyson*, 16 Pet. R. 1. This decision was made upon the maturest consideration, and has prevailed in most of the States, and is expressly extended to collaterals: *Bank of the Metropolis vs. New England Bank. supra*; *Petrie vs. Clark*, 11 Serg. & R. 377, as early as 1824 adopts almost precisely the same view, except that it is not assumed, as matter of necessary implication, that one who accepts security for a debt will, to some extent, change his conduct in consequence. See also *Walker vs. Geisse*, 4 Wharton, 252. In *Holmes vs. Smith*, 16 Maine, 177, it is decided that where negotiable paper is taken in payment of a previous debt, it will exclude all equities in other parties. To the same extent is *Williams vs. Little, supra*. The same view is adopted in *Carlisle vs. Wishart*, 11 Ohio, 172; *Norton vs. Waite*, 20 Maine, 175; *Bostwick vs. Dodge*, 1 Doug. Mich. R. 413; *Bush vs. Peckard*, 3 Harrington R. 385; *Brush vs. Scribner*, 11 Conn. R. 388; *Barney vs. Earle*, 13 Alabama R. 106. In these cases, except *Williams vs. Little*, the question did not arise in regard to negotiable paper being taken as collateral security. But in many of the States, as well as in *Swift vs. Tyson*, and *The Bank of the Metropolis vs. The New England Bank. supra*, all such distinction is disclaimed, and held to have no existence in principle. *Reddick vs. Jones*, 6 Iredell, 107; *Gibson vs. Conner*, 3 Kelley, 47; *Valette vs. Mason*, 1 Smith 89, (Indiana); *Allaire vs. Hartshorn*, 1 Zabriskie, 365; *Blanchard vs. Stevens*, 3 Cush. R. 162. The fallacy of supposing that the creditor is in the same condition after having failed to enforce the collection of his col-

laterals, as if he had not received them, is here placed in the clearest light by Dewey, J.: "If the party had not received the note as collateral security, he might have pursued other remedies to enforce the security or payment of his debt. He might have obtained other securities, or, perhaps, payment in money. It is a fallacy to say, that if the plaintiffs are defeated in their attempt to enforce the payment of these notes, they are in as good a situation as they would have been if the notes had not been transferred to them. That fact is assumed not proved, and from the very nature of the case is matter of entire uncertainty. The convenience and safety of those dealing in negotiable paper seem to require and justify the rule that when a person takes a negotiable note not overdue, or apparently dishonored, and without notice, actual or constructive, of want of consideration, or other defence thereto, whether in payment of a precedent debt, or as collateral security for a debt, the holder would have the legal right to enforce the same against the parties thereto, notwithstanding such defence might not have been effectual as between the original parties." And the Supreme Court of Rhode Island, after very careful and thorough examination of the cases, have recently come to the same conclusion: *Bank of the Republic vs. Carrington*, 5 R. I. R. 515; see also *Atkinson vs. Brooks*, 26 Vt. R. 569. It scarcely seems necessary to enumerate the cases in New York and some other States which have followed their lead, where it has been held that paper negotiated as collateral on account of a previous debt, is not taken for value and is subject to all equities. We think it most unquestionable that the New York courts are right in saying there is no distinction, in principle, between taking such paper in payment and as collateral

to a pre-existing debt. But the truth undoubtedly is, that either forms a good consideration, and the title of the creditor depends upon the *character* of the paper, and is an exception to all rules attaching to the delivery of *other property* as security for a debt.

The main point of the decision in the very case before us, that the trust, which unquestionably attached to the property which formed the consideration of the bills, could not attach to the bills after they had been bona fide negotiated in the market, although merely between debtor and creditor, and no new advance made specifically on such account, goes exclusively upon the peculiar quality and character of negotiable paper as to the transmission of its title. It passes in the market as money. No man is bound to make any inquiry into the title of the holder. And even carelessness, short of bad faith, will not defeat one's title to such paper, taken for value: *Goodman vs. Harvey*, 4 Ad. & Ellis, 870, overruling *Gill vs. Cubit*, 8 B. & Cr. 466. And whether one advances money and then takes the money in payment of his debt, or takes the note or bill on account of the debt, or as collateral security, is not material, either in fact or in law. And, to be consistent, we must either adopt the New York rule that, in both cases there is no value given for the new note or bill, or else insist that value is given in both cases.

It is impossible, as it seems to us, to successfully contend for the contrary, unless where the previous debt is not due, or the new security is such that no trust is reposed in it, and these are exceptional cases. In every other case, the creditor *will* conduct differently on account of the new security, and *will* delay the collection of the previous debt until the result of the new security is determined. And then it is impossible

to restore the creditor to his former position, since time is a very important matter in commercial transactions. We trust that, before many years, all our American courts will adopt the sensible views of the English courts upon this question, and not expend so much strength hereafter in determining the precise difference between receiving a note or bill "on account of," "in payment of," "as collateral to," and "as security for" an existing debt, since no

one, whose perceptions were not rendered very acute by the study of refinements and hair-breadth distinctions, would ever dream that there could be any essential difference in the rights of the creditor to have the full benefits of the new securities, and of "all the collaterals," in the language of Lord Ellenborough in *Bosanquet vs. Dudman*, *supra*, until he obtained full satisfaction of his debt.

I. F. R.

In the Court of Common Pleas of Erie County, Pennsylvania.

WALLACE ET AL. vs. WALLACE ET AL.

1. A will which authorizes executors not only to sell at their option, but also to make valuation, division, and allotments of the estate devised, and to make deeds of conveyance therefor, breaks the descent, and vests the estate in the executors, and the heir at law cannot maintain ejectment therefor.
2. Where a plaintiff in ejectment claims, not as heir at law, but as devisee under a will which authorizes the executors not only to sell, but also to make a valuation and allotment of the estate devised, she must show that these provisions of the will have been complied with, so that her portion or purpart may be known and distinguished from that of other devisees mentioned in the will.
3. When an estate is devised to trustees, they to pay over or convey to the *cestui que trust* the one-half part of what they should receive of the estate, and the yearly proceeds of the other half during her natural life, the trustees are the repository of the title for her benefit, and she cannot maintain ejectment for it.
4. If executors or trustees, created by a will, are authorized to make division and allotment of real estate, and neglect or refuse to do it, the remedy for the *cestui que use* is in the Orphans' Court.

This was an action of ejectment for about 4000 acres of land in Erie county, brought by Elizabeth Wallace and J. W. Wall, trustee of Elizabeth Wallace, against John William Wallace and others, No. 149, of May Term, 1860, in the Court of Common Pleas of Erie county, Pennsylvania. The plaintiffs, to sustain their action, offered in evidence a copy of the will of Mrs. Tace Wallace, dec'd, late of Burlington, New Jersey, from the Prerogative Court of said

State. Defendants objected to the evidence because it was not properly certified; the court sustained the objection and rejected the evidence. The defendants, however, waived the informal certificate, and it was again offered, when it was again objected to, for the reasons hereafter mentioned in the opinion of the court; so much of the will, dated July 1821, as is of importance to this case, is as follows, to wit:

"2. *Whereas several of my children, by deed dated the 2d July, 1819, did grant and convey to me all their share and interest in the property and estate of their father, I direct my executors hereinafter named, as soon as conveniently may be, to make an estimate of all the property which I have, or may be entitled to, as well under the said deed as otherwise, and then I direct the whole to be divided into six equal parts.*"

Here follow several specific legacies, and then :

"6. One other equal and sixth part I give and devise to my daughter, Elizabeth Wallace, her heirs and assigns: *Provided, that as my said daughter Elizabeth did not join in the said deed of the 2d of July, 1819, and will therefore be entitled to receive some portion of her father's estate, it is my will and intention, that whatever amount she shall receive therefrom shall be deducted from the said sixth part devised to her, and the shares so arranged as that they may be all thus equalized, and all the said girls receive an equal amount from the estate of their said father and my estate together.*"

On the 26th February, 1823, a codicil was added to this will, in which was contained the following: "I direct my estate and the proceeds of such part or parts as shall be sold, to be divided into four parts instead of six, and one-fourth to each of my daughters, as in my said will is directed as to one-sixth; *subject to the deductions and provisions therein stated.*" * * * "And I direct that the act of a majority of my executors shall be binding on the rest, and as valid and effectual as if done by all. And I authorize my executors, or a majority of them, *to sell any part of my said estate they may think proper. And the valuation, division, and allotment of my said estate, and its proceeds, I direct to be made by my executors, or a majority of them, or by such person or persons as they shall*

call in for that purpose, and the deed of conveyance of the executors, or a majority of them, to make and create a good, sufficient and valid title and estate."

On the 18th day of March, 1826, testatrix added the following codicil to her will :

"I hereby republish all the foregoing as my last will and testament, except as hereinafter excepted, that is to say, I revoke so much thereof as makes my daughters, Rachel and Elizabeth, to be executors, declaring that my sister, Mrs. Susan V. Bradford, my daughter Mary, and my son-in-law, Mark W. Collet, to be my executors; and if either or any of them refuse to act, then the other or others to be so, giving to them and to survivors, and survivors of them, all the power hereinbefore and above stated; the majority having power to act, as before stated. *And in regard to the bequest which I have herein made to my daughter Elizabeth, instead of giving and devising to herself, as hereinbefore stated, I devise and bequeath what is devised and bequeathed to her, to Dr. Nathan W. Cole and Mark W. Collet, their heirs and assigns, and to the survivors of them, and the heirs and assigns of the survivor, and if either refuse to accept, to the other, his heirs and assigns in trust, that they pay over, or convey to her the one-half part of what they shall receive therefrom, absolutely in fee, and to her own disposal, and that the other half they retain and pay to her the yearly interest and revenue and profits arising therefrom* (after deducting charges and expenses,) during her natural life, and after her death, that they shall hold the same in trust for such children of my late son, Joshua W. Wallace, Junr., as shall be alive at the time of my decease, share and share alike; and if any of them die before the age of twenty-one years, the share of such to go to the survivors or survivor, *and that the said moiety so held in trust may produce a revenue and interest*, I authorize the said trustees, or whichever may act, and the survivor of them, and the heir and assigns of the survivor, to sell, lease, or otherwise dispose of the same, either for cash or credit, or any part or parts thereof, and the proceeds thereof, to invest in any such way as they may think proper, to be by them held on the same

trusts and with the same power as at first, and so *toties quoties*; but it is to be entirely at the discretion of the trustees or trustee for the time being, whether they or he will sell or not, and how and upon what terms, and how they or he will invest without the direction or control of the *cestui que trust*; and the said trustee or trustees are to settle with my executors what is the share or portion thus devised, and their or his acquittance, exonerate or discharge the executors without the *cestui que trust*."

John P. Vincent and Wilson Laird, for plaintiffs.

Hon. Gaylord Church, James C. Marshall, John Wm. Wallace, and Benjamin Grant, for defendants.

The opinion of the Court was delivered by

DERRICKSON, J.—The plaintiffs have offered in evidence, as the basis of their right of action, the will of Mrs. Tace Wallace, and the defendants (waiving the incompleteness of its authentication) object to its reception for the purpose for which it is offered, "because it vests no title in the plaintiffs, or either of them, nor gives them such possession or right of possession as will entitle them to maintain their ejectment."

If the right to recover depended alone on the will without the codicils, it would doubtless be complete as to one of the plaintiffs, but unfortunately for him, a codicil was appended, which authorized the executors not only to sell at their option, but also to make valuation, division, and allotments "of the estate devised, and deeds of conveyance therefor." While, therefore, Miss Wallace has an interest in the will of her mother, it is still quite evident she has not such an one as will entitle her to maintain an ejectment for the land covered by it, because it is vested in the executors, though for special purpose. The title could not vest in the executors and the *cestuis que use* at the same time, and the plaintiffs claim by virtue of the will, she cannot claim superior to it. The line of descent was broken by the will, and she claims not as heir at law, but as devisee. To entitle her to succeed, she must show that the terms or provisions of the will have been complied with in the

valuation, division, and allotment of the estate, so that her portion or purpart might be known and distinguished from that of the other devisees mentioned in the will. But this has not been done. This, of itself, would warrant the rejection of the will. But there is another reason therefor. By a subsequent codicil, the testator devises the share previously given to her daughter Elizabeth directly, to trustees, in trust, they pay over or convey to her the one-half part of what *they should receive* of the estate, and the yearly proceeds of the other half during her natural life. This codicil clearly takes away her title to the estate devised, and she can have none in it but through the trustees. They are the repository of the title, though for her benefit, and there it remains until it is properly divested. Has this been done? It is not even alleged that it has been, and we cannot here go into an investigation to ascertain what proportion of the land in controversy, if any, would belong to Miss Wallace. The Orphans' Court is the proper place for this should the executors and trustees decline the execution of their duties. Had action been taken in either way, and the apportionate allotments been made, the plaintiffs, or Miss Wallace alone, might be entitled to recover; but claiming, as she does, exclusively under the will, it would be useless to receive it in evidence, and then have to tell the jury that it vested, *per se*, no such right in her as would entitle her to recover. The introduction of Mr. Wall's name as a co-plaintiff and trustee of the other, gives no additional right to recover, as he is not named in the will, nor is there any evidence of his right to act in either capacity.

For these and other reasons, equally obvious, the objection is sustained, and the evidence rejected.

In the New York Supreme Court, General Term. Fifth District.

BROUNER vs. GOLDSMITH ET AL.

When the plaintiff in the course of a trial calls out the declarations of the defendant, it does not follow, that all that was said by defendant can be given in evidence, but only that which tended to qualify that given in evidence by the plaintiff, and no more.

Appeal by the plaintiffs from a judgment entered after a trial at the Circuit with a jury. It appeared in evidence that the plaintiff took a claim of the defendants against Adler & Garson, to collect and have one-third realized, and after the claim had been sued by the plaintiff, the defendants compromised the claim with Adler & Garson, and discharged them without plaintiff's consent. The defendants denied making any such contract with the plaintiff. On the trial the plaintiff tendered a witness to show that the defendants compromised with Adler & Garson, and the defendants called for all that was said upon that occasion, including what was said about the commission, and also what was said about the conditions upon which the plaintiff took the claim for collection. The plaintiff was not present. The Court received the evidence, and the plaintiff excepted, and the defendants had a verdict, and the plaintiff appealed.

G. N. Kennedy, for plaintiff.

N. F. Graves, for defendants.

The opinion of the Court was delivered by

ALLEN, J.—I am of opinion that the Justice erred in admitting evidence of the declarations of defendants at the time they settled the debt against Adler & Garson.

The plaintiff had not called for any declaration of the defendants on that occasion. They had proved a fact, to wit, the compromise and discharge of the debt, and it would probably have been competent for defendants to prove what was said concerning the settlement, and so much of the conversation as made a part of the negotiation as a part of the *res gesta*, and to show what was done; and had the plaintiff called for any part of the conversation, the

defendants could only have given so much of the residue of the conversation as tended to qualify that given in evidence by the plaintiff, and no more; that is, they could have given all upon the same subject. But there is no pretence that the plaintiff had directly or indirectly called for any declarations of the defendants concerning the agreement between them, and the conversation was admitted under the offer to show "what defendants may have said about plaintiff taking this claim."

The evidence was erroneously admitted, and we cannot say that it did not influence the result.

The judgment must be reversed and a new trial granted; costs to abide result.

RECENT ENGLISH DECISIONS.

*In the Court of Queen's Bench, sitting in Banc after Hilary Term, 1861.*¹

LOUIS CASTRIQUE vs. SOLOMON LEVI BEHRENS AND OTHERS.

Declaration stated that the registered owner of a British ship mortgaged it, and on the 9th of April, 1855, the plaintiff became the mortgagee; that on the 8th June, 1854, the captain, while on a voyage, drew a bill at Melbourne, in Australia, on the owner in England, for necessary disbursements of the ship, in favor of L. & Co.; that L. & Co., without value, indorsed it to the defendants, British subjects residing in England; that the bill was dishonored; that the defendants, knowing the premises, and that the ship was about to call on her voyage at the port of Havre de Grace, in France, and that by the law of France the bonâ fide holder for value of such a bill (if a French subject) could take proceedings in the French courts and attach and sell the ship, conspired with T., a French subject, that they should indorse the bill to him without value, and that he should take proceedings in the French courts, and falsely represent that he was bonâ fide holder of the bill for value; and thereupon T., upon the arrival of the ship in a French port, took proceedings in the French courts, and therein obtained orders for the attachment and sale of the ship; and the plaintiff was deprived of his property in the ship: *Held*, that this being a judgment in rem, though in a foreign court, an action could not be maintained while it remained unreversed, as it was consistent with the averments in the declaration that the plaintiff had notice of the proceedings in France, and allowed judgment to go by default, or

¹ 7 Jurist N. S., 1028.

even that he appeared in the French court, and the question whether T. was a holder of the bill for value was decided against him.

The question in this case arose on demurrer to a declaration, the substance of which is sufficiently stated in the preceding head note.

Hall, for the plaintiff.

A conspiracy to defraud the plaintiff, and deprive him of his property, as in the declaration set forth, though carried out abroad, is the subject of an action in the courts of this country. In *Coze vs. Smith*, 1 Lev. 119, it was held actionable to procure an officer of the custom-house to be deprived of his office by means of a false oath. In *F. N. B.*, 116 D., it is said, "Conspiracy shall be maintainable against those who conspire to forge false deeds which are given in evidence, by which any person's land is lost;" and the precise mode of effecting the object by means of the fraud is immaterial (Lord Campbell, in delivering the judgment of the court in *Gerhard vs. Bates*, 2 El. & Bl. 476, 491; 17 Jur. 1097, 1100); and it is immaterial whether the false representation which causes the damage be made to the person himself or to another who has power to deprive the person of his property. [He also cited *Gregory vs. The Duke of Brunswick*, 6 Man. & G. 205; 7 Scott's N. R. 972.] As to the objection that this is an action for an abuse of the process of a foreign court, the first answer is, that the gist of the action is, that there was a conspiracy in this country to deprive the plaintiff of his property, by means of the two overt acts—the fraudulent indorsement of the bill, and the false representation made to the court abroad. Secondly, an action will lie for a conspiracy to abuse the process of the courts in this country, for which redress might be obtained otherwise than by action; a fortiori it will lie for an abuse of the process in foreign courts, when the court does not know whether the party injured has any mode of obtaining redress in the foreign country. [He cited *Grainger vs. Hill*, 4 Bing. N. C. 212; 5 Scott, 561; *Heywood vs. Collinge*, 9 Ad. & El. 268; *Whitelegg vs. Richards*, 2 B. & Cr. 45; *Daniels vs. Fielding*, 16 M. & W. 200; 10 Jur. 1061; and *Farlie vs. Danks*, 4 El. & Bl. 493; 1 Jur. N. S. 331.] An action lies for a false affidavit, by which the process of the court is put in motion. (*Case of False Affidavits*, 12 Rep.

128.) [He also cited Willes, J., in *Revis vs. Smith*, 18 C. B. 126, 142; 2 Jur. N. S. 614, 616.] The rule, that the declaration should show the termination of the proceedings which are the ground of the action, is not applicable to a foreign judgment. The reason of the rule is, that there might be inconsistent or incongruous judgments on the records of the courts of this country. Further, this court has no means of knowing that the plaintiff could take proceedings to set aside the judgment in the French court. Also, an allegation that the termination of the proceedings was in favor of the plaintiff is not required, where the action is for an abuse of the law (Vaughan, J., in *Grainger vs. Hill*, 4 Bing. N. C. 212, 223), or where the proceedings were ex parte, because there is no opportunity of controverting them. *Steward vs. Gromett*, 7 C. B., N. S. 191; 6 Jur. N. S. 776. It appears on the face of this declaration that the plaintiff was not a party to the proceedings in the French court. Thirdly, if this judgment was a judgment in rem,¹ it is not conclusive, being shown to have been obtained by fraud. In *The Duchess of Kingston's case*, 2 Smith's L. C. 601, 633, 4th ed., speaking of a sentence of the ecclesiastical court, it is said, "But if it was a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the point, and not to be impeached from within, yet, like all other acts of the highest judicial authority, it is impeachable from without. Although it is not permitted to show that the court was mistaken, it may be shown that they were misled." The declaration does not allege that proceedings in rem were taken in France. "So it must appear that there have been regular proceedings to found the judgment or decree, and that the parties in interest in rem have had notice or an opportunity to appear and defend their interests, either personally or by their proper representatives, before it was pronounced; for the common justice of all nations requires that no condemnation should be pronounced before the party has an opportunity to be heard." (Story's Conf. Laws, s. 592, p. 987, 3d ed.)

¹ See *Castrique vs. Imrie*, 8 C. B., N. S., 405, in which the Exchequer Chamber held that the judgment was in rem, reversing the judgment of the Court of Common Pleas, 8 C. B., N. S., 1; 6 Jur. N. S., 1058. See *Cammell vs. Sewell*, in error, 5 H & Norm., 728; 7 Jur. N. S., 918.

If this action will not lie, there is no remedy for the plaintiff against the defendants, who are English subjects resident in England. No criminal proceedings could be taken in this country against the defendants; they could not be charged as accessories to the fraud of Troteux in France.

Montague Smith, (with whom was *Watkin Williams*,) contra.—First, any abuse of the process of a foreign court, or any malpractice in relation to proceedings in such court, affords no ground of action in this country. An action will not lie against parties conspiring in England to do and to prosecute, and doing and prosecuting certain acts and proceedings in a foreign country, unless the doing and prosecuting such acts and proceedings by such conspiracy is illegal or a cause of action in the foreign country, and according to the law thereof. Assuming the proceeding in the court of France to be a proceeding in rem, if it was a judgment in this country this action would not lie. The proper course would be to get it reversed, or to apply to the court to take it off the file of the court. The sentence of a foreign Court of Admiralty, adjudging a ship to be lawful prize, is conclusive. (*Hughes vs. Cornelius*, 2 Show. 232, [see the special verdict set out in the note, p. 233,] S. C., 2 Smith's L. C. 604, 4th ed.) In note (Id. 614) it is said, "With regard to these judgments in rem, . . . they, like all others, . . . are conclusive as to nothing which might have not been in question, or was not material. *The Attorney-General vs. King*, 5 Price, 195." [WIGHTMAN, J.—Which party is to show that the plaintiff was summoned, or had notice of the proceedings?] It is not to be presumed that the proper parties were not summoned, and that the court in France would not cause a proper summons to be issued before the property in the ship was sold and disposed of; and therefore it is for the plaintiff to show that he was not summoned. [WIGHTMAN, J.—It may be a valid judgment in rem, though the plaintiff knew nothing about it. As far as we know anything of the proceedings in rem, there is no occasion for notice to the true owner.] The declaration charges that the defendants conspired with Troteux that he should falsely and fraudulently represent that he was the bona fide holder of the bill for value. If that

was not true, evidence might have been given to the contrary. [He cited Hale, C. B., in *Vanderbergh vs. Blake*, Hardr. 194, 195, and Erle, C. J., in *Barber vs. Lesiter*, 7 C. B., N. S. 175, 187, 188; 6 Jur. N. S. 654.] [*Hall*.—At the time when the ship was attached the plaintiff had no notice, but before the ship was sold the plaintiff had notice. It is very doubtful whether the plaintiff could have intervened to prevent the sale of the ship.] Before an action can be brought for instituting proceedings, the proceedings must have terminated in favor of the plaintiff; *Whitworth vs. Hall*, 2 B. & Ad. 695; and that principle is not impeached in *Steward vs. Gromett*, 7 C. B., N. S. 191; 6 Jur. N. S. 776. If the plaintiff is damnified to an extent for which he is not recompensed by the judgment in his favor in France, this action might lie for the excess. In *Farlie vs. Danks*, 4 El. & Bl. 493; 1 Jur., N. S., 331, the bankruptcy was superseded before action brought. In *Collins vs. Cave*, 4 H. & Norm. 225; 5 Jur., N. S., 296, Pollock, C. B., said, (p. 229,) "If an action could be maintained for maliciously suing, I do not know when litigation would end; the next step would be an action for maliciously subpcœnaing a witness;" and Martin, B., added, "An action for maliciously suing would involve a trial whether the judgment in the former action was right;" and as Hale, C. B., said in *Vanderbergh vs. Blake*, (Hardr. 195,) "If such an action should be allowed, the judgment would be blown off by a side-wind." [He also cited Jervis, C. J., in *Haddan vs. Lott*, 15 C. B. 411.] [WIGHTMAN, J.—In *Smith vs. Tonstall*, Carth. 3, it was held that an action would lie where the declaration charged that the defendant conspired with W. S. to defeat the plaintiff in recovering rent in arrear from W. S., by procuring W. S. falsely to confess a judgment to W. N., and that W. N. sued out execution upon that feigned judgment, by virtue whereof he seized the goods of W. S., and the plaintiff lost his debt. And it is added, (p. 4,) that the defendant brought a writ of error in Parliament, where the judgment was affirmed. And in *Saville vs. Roberts*, 1 Salk. 18, it is said, (p. 14,) "And yet, if one that is not concerned, as a stranger, procure another to sue me causelessly, I may maintain against him generally," referring to

F. N. B. 98, N.; 2 Inst. 444; and 3 Cro. 378. In 1 Com. Dig., by Hammond, "Action upon the Case for Conspiracy," 339, it is said: "So it lies for procuring an action to be brought against another maliciously," citing F. N. B., 116, E., and *Skinner vs. Gunton*, T. Raym. 176.] That is where special damage results. (Marginal Note to *Saville vs. Roberts*, 1 Ld. Raym. 380.) [WIGHTMAN, J.—It is also said in Com. Dig., that an action lies if a man "sue in the name of A. without his privity, though it be for a just debt." And in *Saville vs. Roberts*, 1 Ld. Raym. 380, "If a stranger who is not concerned excites A. to sue an action against B., B. may have an action against the stranger," citing F. N. B. 98, N., and 2 Inst. 444. All the authorities are collected in *Cotterill vs. Jones*, 11 C. B. 713, in which it was held that case will not lie against two persons for conspiring together maliciously and vexatiously, and without reasonable or probable cause, to commence and commencing an action against the plaintiff in the name of a third person, but for their own benefit, without an allegation of legal damage resulting to the plaintiff therefrom.] This is not an action for maliciously exciting persons who had no interest in the proceeding; the defendants were holders of the bill. [WIGHTMAN, J.—But they were holders without value.] Still the defendants might be entitled to hold the proceeds against all the world. [WIGHTMAN, J.—In F. N. B., 98, H., it is said, "If an action of debt be brought against two as executors, where one of them is not executor, if he who is not executor confess the action, he who is executor shall have a deceit against him, and recover as much in damages."]

June 7.—*Holl*, in reply.—A judgment in rem is not conclusive, except upon the precise point decided. The plaintiff does not seek to impeach the judgment of the Court in France as to the status of the ship itself, nor as to the facts necessary to enable that Court to arrive at its determination. [He cited Tayl. Ev., s. 1490, 3d ed.; Lord Ellenborough, in *Fisher vs. Ogle*, 1 Camp. 417, 418; and Tindal, C. J., in *Dalyleish vs. Hodgson*, 7 Bing. 495, 504.] It was for the defendants to show that the plaintiff had an opportunity of intervening before judgment was given; this Court cannot take cognisance of proceedings of which they have no knowledge. Even

if the plaintiff could take proceedings to set aside the judgment, will the Court compel him to seek justice abroad? Suppose war between this country and France. [COCKBURN, C. J.—That argument applies to any case. BLACKBURN, J.—Even when war is raging between this country and another, this Court gives credit to the judgment of the Admiralty Court of that country.] *Haddon vs. Lott*, 15 C. B. 411, and the cases in *Cotterill vs. Jones*, 11 C. B. 713, were decided on the ground that it was not shown that there was any damage to the plaintiff, or that the damage naturally flowed from the grievance charged in the declaration.

Cur. adv. vult.

Feb. 23.—CROMPTON, J., delivered the judgment of the Court.—In this case the demurrer to the declaration raises a question of some difficulty.

There is no doubt, on principle and on the authorities, that an action lies for maliciously, and without reasonable and probable cause, setting the law of this country in motion to the damage of the plaintiff, though not for a mere conspiracy to do so without actual legal damage. (*Cotterill vs. Jones*, 11 C. B. 713; *Barber vs. Lesiter*, 7 C. B., N. S., 175; 6 Jur., N. S., 654.) But in such an action it is essential to show that the proceeding, alleged to be instituted maliciously and without probable cause, has terminated in favor of the plaintiff, if from its nature it be capable of such a termination. The reason seems to be, that if, in the proceeding complained of, the decision was against the plaintiff, and was still unreversed, it would not be consistent with the principles on which law is administered, for another Court, not being a Court of appeal, to hold that the decision was come to without reasonable and probable cause.

In the present case, the proceedings were not instituted in the courts of this country, but they are stated to be proceedings in rem in the Courts of France. There is no direct authority on the point, but it seems to us that the same principle, which makes it objectionable to entertain a suit grounded on the assumption that the unreserved decision of a Court in this country was come to without reasonable and probable cause, applies where the judgment,

though in a foreign country, is one of a Court of competent jurisdiction, and come to under such circumstances as to be binding in this country. A judgment in rem is, as a general rule, conclusive everywhere and on every one, and we do not think that the averments in the declaration show that this judgment in rem was obtained under such circumstances as to be impeachable by the present plaintiff. It is averred, and we must on the demurrer assume that it is truly averred, that by the law of France the judgment in rem can only be obtained if the holder of the bill of exchange be a French subject, and bona fide holds for value; and we must take it as admitted on this demurrer, that Troteux, the French holder of the bill of exchange, by the fraudulent procurement of the defendants, falsely represented to the French Courts that he was holder for value when he was not.

It is not necessary to say what would be the effect if it were stated that, by the contrivance of the defendants, the proceedings were such that the plaintiff had no opportunity to appear in the French Court and dispute the allegation. In the present case it is quite consistent with the averments in the declaration, that the plaintiff had notice of the proceedings in France, and purposely allowed judgment to go by default, or even that he appeared in the French Court, intervened, and was heard, and that the very question whether Troteux was a holder for value, was there decided against him.

We think on the principle laid down in *The Bank of Australasia* vs. *Nias*, 16 Q. B. 717, 15 Jur. 967, that the plaintiff cannot impeach the judgment here on such grounds, and that whilst it stands unreversed this action cannot be maintained.

The declaration being thus, in our opinion, bad, and the defendants, therefore, entitled to our judgment, it is unnecessary to consider the sufficiency of the pleas.

Judgment for the defendants.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF MASSACHUSETTS.¹

Insolvent Laws, Ex-Territorial Effect of—Constitutional Law.—A certificate of discharge under the insolvent laws of this Commonwealth, is no bar to an action upon a promissory note given in this Commonwealth, payable at no particular place, but indorsed to a citizen of another State before the commencement of the proceedings in insolvency, although not indorsed until after it became due: *Fessenden vs. Willey*.

Principal and Agent.—Insurance Company, Liability for Representations as to Capital.—An insurance company is bound by representations in reference to the amount of its capital stock which is paid in and invested, made, in reply to the inquiries of applicants for insurance, by an agent duly appointed under its by-laws, whose business it is to solicit risks, receive and transmit applications, receive back and deliver policies, and receive the premiums; especially if it appears that he was expressly authorized to make the representations by officers of the company: *Fogg vs. Griffin*.

Trust and Trustee—Ante-Nuptial Contract—Rights of Cestui que Trust to compel Execution.—The surviving husband of a woman who, in contemplation of marriage with him, made with him ante-nuptial contract, providing, that in case she should die leaving issue surviving her, a certain note and mortgage should be held to the use of her intended husband for his life, with remainder to her issue in fee simple, and she has since died leaving issue surviving her, may maintain a bill in equity against one to whom she, in her last sickness, delivered the note and mortgage, with directions to retain and hold them in trust for the purposes declared in the ante-nuptial contract, and especially to protect the rights and interests of her children, to compel the delivery of the same either to himself, or to such person as the court may appoint trustee: *Lawrence vs. Bartlett*.

Mortgage—Right of Mortgagee to claim Rent of Premises.—A mortgagee of a term of years, upon giving notice to one who holds a prior underlease of a portion of the premises, that by virtue of his mortgage he shall claim all rent then and thereafter due from him, is entitled to recover the same; and an oral agreement between the mortgagor and mortgagee

¹ The following abstracts have been furnished by Charles Allen, Esq., the State Reporter.

that the former shall receive the rent cannot be shown in defence of an action by the mortgagee to recover it: *Russell vs. Allen*.

Assignment—Operation on future Rights.—An assignment of all claims which the assignor may have on a future day, which is named, for sums of money due and to become due for services in the fire department in the city of Boston, is ineffectual to pass to the assignee sums earned before that day; but under a subsequent appointment as fireman, if there was no agreement for such subsequent appointment existing at the time of making the assignment; a sum earned under such subsequent appointment, and collected of the city by the administrator of the assignee, may be recovered from the administrator in an action for money had and received: *Twiss vs. Cheever*.

Husband and Wife—Dower, Whether barred by Elopement with an Adulterer.—In this Commonwealth, a woman is not barred of her right to dower by leaving her husband and living with an adulterer, if no divorce is decreed therefor: *Lakin vs. Lakin*.

Husband and Wife—Action for Wife's Property, How brought.—No action can be sustained, in Massachusetts, by a husband and wife jointly, to recover for the conversion of property which they claim under a mortgage executed to the wife alone, to secure money lent by her, a portion of which was furnished to her by her husband: *Hennessey vs. White*.

Principal and Surety—Liability of Principal not Discharged by offer of Payment by Surety after Action Brought.—In an action to recover the price of labor, in which the defence is that the labor was performed on the credit of a third person, evidence of an offer by such third person, after the commencement of the action, to pay the plaintiff for the same, is incompetent: and the admission of such evidence is sufficient ground for setting aside a verdict in favor of the defendant, although the jury were instructed that, if the work was done for the defendant, the plaintiff was not bound to accept payment from any one else, and that, in such case, no offer of payment by a third person should have the slightest influence upon their judgment: *Larry vs. Sherburne*.

Trust—How constituted.—A deposit of money in the hands of a third person, to be held in trust for the depositor's minor son, with the agreement that the trustee shall retain it for a specified time at a specified rate of interest, and in the mean time prepare a deed of trust, creates a complete trust, and leaves no power in the depositor to dispose of the money for his own benefit: *Sherwood vs. Andrews*.

NEW YORK COURT OF APPEALS.¹

Husband—Action for Injury causing Wife's Death—Measure of Damages.—Where a husband brings an action as administrator of his wife, for the damages resulting from her death by the negligence of the defendant, he can recover only for the pecuniary injury sustained by her next of kin. The value of her services to him does not enter into the estimate of damages, and evidence thereof is inadmissible: *Dickens vs. The N. Y. Central R. R. Co.*

Constitutional Law—Prohibition Against Pledge of State Credit for Corporation—State Loan when Payable.—A State loan, reimbursable at the pleasure of the State after twenty years, has no term of payment until the Legislature has fixed it by law: *People, ex rel. De Forest, vs. Deniston.*

Where such a loan was made under a law passed before the Constitution of 1846, for the benefit of the Long Island Railroad Company, which was bound to redeem the stock, an act giving to its holders the option of having it made payable in 1876, is not in violation of the constitutional prohibition of the loan of the State credit to corporations: *Ib.*

Bills and Notes—Liability of Endorser of Note Payable on Demand.—A promissory note payable on demand, with interest, is a continuing security; an endorser remains liable until an actual demand; and the holder is not chargeable with neglect for omitting to make such demand within any particular time: *Merritt vs. Todd.*

Whether, however, the lapse of time, or a failure to pay interest at the customary periods, may not subject the holder of a note after transfer to a defence existing in favor of the maker against the first holder. *Quere. Ib.*

Railroads—Right to eject Passengers, how to be exercised—Lawful Resistance to—Concurrent Negligence.—To eject a passenger from a railroad car, while in motion, is so dangerous an act that it may justify the same resistance on the part of the passenger as to a direct attempt to take his life: *Sanford vs. The Eighth Av. R. R. Co.*

Where the passenger is liable to ejection in a proper manner, for refusing to pay fare, his resistance to the attempt to expel him without stopping the car, does not present a case of concurrent negligence on his part: *Ib.*

¹ From E. P. Smith, Esq., Reporter of the Court.

Where, in such a case, the principal is responsible for the act of his agent, he is, it seems, also responsible for any circumstances of aggravation which attended the wrong: *Sanford vs. The Eighth Av. R. R. Co.*

Water-course, Action for Obstructing—Public Improvement.—One who, without legislative authority, interferes with the current of a running stream, is responsible, absolutely and without regard to actual negligence, for the damages sustained in consequence of his interposition by those who are entitled to have the water flow in its natural channel: *Bellinger vs. N. Y. Cent. Railroad.*

Where, however, such interference is in pursuance of legislative authority, granted for the purpose of constructing a work of public utility, upon making compensation, the party obstructing the stream is liable only for such injury as results from the want of due skill and care in so arranging the necessary works as to avoid any danger reasonably to be anticipated from the habits of the stream and its liability to floods: *Ib.*

Non-Resident Debtor—Effect of Foreign Composition.—Under the proceedings against a non-resident debtor, all creditors at the time of issuing the first warrant of attachment against him, are entitled to come in and share in the distribution of his estate, whether they be residents or not residents of this State or the United States, and without regard to the place where the debt was contracted: *Matter of Bonaffe.*

Such right is not divested by the creditor's being a party to a *concordat* or composition with creditors, made in France, where the debtor resided, and confirmed by its judicial tribunals, which provided that the debtor should be free in his person and his property: *Ib.*

Whatever may be the effect of such a *concordat* in respect to the future acquisitions of the debtor, it does not discharge the claim of any creditor to share in the existing property of the debtor: *Ib.*

It seems that the proceedings under the French bankrupt system, never effect the absolute discharge of the debtor, but that its extent depends upon the interpretation of the composition between him and the creditors. Per DAVIES, J.: *Ib.*

Husband and Wife—Of what Widow Dowable.—A widow is not dowable of land in which her husband has only a vested remainder, expectant upon an estate for life: *Durando vs. Durando et al.*

This rule holds as well where the estate of the husband comes by devise, as by inheritance: *Ib.*

The word "purchase," as used in Coke, Litt. 31, in reference to this point, is limited to a purchase by deed: *Ib.*

SUPREME COURT OF PENNSYLVANIA.¹

Criminal Law—Homicide in Self-defence.—The killing of one who appears to be an assailant is excusable, if there be reasonable apprehension of loss of life or of great bodily harm, so imminent at the moment of assault as to present no alternative of escaping the consequences but by resistance, though it afterwards appear that there was no actual danger: *Logue vs. Com.*, 2 Wright, 265.

Guardian—Personal Liability for Mortgage on Ward's Estate—Relief in Equity.—A guardian who purchases a house and lot expressly subject to the payment of the balance of a mortgage given to his vendor, incurs a personal responsibility to the amount of the unpaid mortgage, though the purchase was made by the sanction and direction of the Orphans' Court: *Woodward & Craig's Appeal*, 2 Wright, 322.

But the Orphans' Court, as a court of equity, has the right, before the estate passes out of its control, so to dispose of the trust fund in the hands of the testamentary trustee, as to protect the guardian who incurs such personal responsibility, and indemnify him against loss on account of it: *Id.*

Negligence of Fellow Servant—Liability of Employer for—Railroad Company.—Character for care, skill, truth, &c., though growing out of the special acts of a party, cannot be established by proof of such acts, but by evidence of general reputation.—*Frazier vs. Penna. R. R. Co.*, 2 Wright, 104.

Although it is settled that where several persons are employed as workmen in the same general service, in the prosecution of which one of their number is injured through the carelessness of another, the employer is not responsible; yet, where the defendant (a railroad company) was charged with having knowingly employed a conductor who was unfit for the business, it was held not error to instruct the jury, that, this fact being properly established, the company were chargeable with the consequences of the conductor's carelessness: *Id.*

The officer having charge of the department of business, in which the alleged injury occurred, is the person required to use that degree of dili-

¹ From the advance sheets of the second volume of Mr. Wright's Reports, which he has kindly allowed us to use.

gence in the selection of competent employees, which is necessary to exempt a company from liability for their negligence. His carelessness and his knowledge in this respect, are the carelessness and knowledge of the company. *Held*, therefore, that it was error in the court below to reject evidence offered to show that the Superintendent of the Company (whose duty it was to employ and supervise the conductors of the company) did not know that the person employed in this capacity, and by whose improper conduct the alleged injury occurred, was a careless officer: *Id.*

Where the plaintiff (who was employed by the railroad company as a brakeman) knew that his conductor was habitually careless, and chose to continue in service with him, neither informing the company of his known acts of carelessness, nor refusing to serve with him, it was held, that he could have no claim against the company for injuries suffered from further carelessness on the part of the conductor, even though the company also knew it: *Id.*

Married Women—Validity of Bond by.—A judgment bond given by a married woman for the purchase-money of a lot of ground conveyed to her, though invalid, as a personal obligation, will constitute a valid lien upon the property: *Ramborger's Adm'rs. vs. Ingraham*, 2 Wright, 146.

Limited Partnership—Where Special Partner liable.—No partnership is limited in Pennsylvania, unless it be formed in strict compliance with the Acts of Assembly relating to limited partnership: *Richardson vs. Hogg*, 2 Wright, 158.

The Act of Assembly in relation to limited partnership, requires that the capital contributed by the special partner shall be in actual cash; it cannot be in a stock of goods: *Id.*

Where, in the articles of limited partnership, it was stipulated that the son of the special partner should keep the books, and have a general supervision over the business during the partnership, at a salary, and that the general partner should sign no note, or check on bank for firm money, without the son's knowledge and approval, it was *held*, in an action by one of the creditors against the special partner, that the partnership was not limited but general, and that the special partner was liable for the firm debts: *Id.*

Common Carrier—Freight pro rata—Wrongful Sale of Cargo by Master.—A contract of affreightment, whereby a shipowner undertakes

the conveyance of goods, is executory and entire; and where delivery, according to the consignment, is prevented by the perils of the sea, he can recover from the shipper, neither full freight nor freight *pro rata itineris*, unless the cargo be received by, or on the part of the shippers at an intermediate port, when partial freight is due on an implied new contract: *Richardson vs. Young*, 2 Wright, 169.

A ship laden with corn, from Philadelphia for Liverpool, having stranded, the corn was taken back to Philadelphia, surveyed, condemned, and sold by the master, without notice to the shippers, who, however, sometime afterward received a part of the proceeds. In an action by the shippers against the owners of the vessel to recover the value of the corn, it was *held*, that the defendants were not entitled to a set-off for full or partial freight, there being no acceptance of the cargo on the part of the plaintiffs, by consent to the sale, or by the receipt of part proceeds, on general average account, and that the master, though the agent of the shippers for some objects, was not their agent for the purpose of a sale. *Id.*

The sale of the corn fixed the rights of all parties, and notices subsequent thereto, in relation to the loss, were irrelevant and inadmissible, so also evidence that full freight had been paid on beeswax taken from the stranded ship and reshipped, at the cost of her owners, to the port of destination, upon another vessel: *Id.*

SUPREME COURT OF NEW YORK, GENERAL TERM, FIRST DISTRICT,
FEBRUARY, 1861.¹

Assignment of Property in Trust for the Benefit of Creditors—Action to set aside Assignment.—Though the appropriation, by an insolvent firm, of partnership property to the payment of individual debts, is fraudulent, and renders the assignment void as to creditors of the firm, yet an assignment which purports to be an assignment of all individual as well as partnership property, is not fraudulent and void on its face, where there is nothing appearing thereon to show that all the partners may not have had individual property more than sufficient to pay their individual debts, preferred by the assignment: *Knauth et al. vs. Barrett et al.*

It is for the assignor and their assignee to show that the individual property of each partner was sufficient to pay his own preferred debts: *Id.*

Municipal Corporation—License to run Cars.—Where the Common Council of a city enters into a specific agreement with a Railroad Com-

¹ From the Hon. O. L. Barbour, Reporter of the Court.

pany, prescribing the regulations to which the company shall be subject, requiring no further license, and reserving no right to require one, they are concluded, by their contract, from afterwards passing an ordinance requiring the taking out of a license, and the payment of a fee by the company, to entitle it to run its cars. The agreement itself is a license: *Mayor, &c., of New York vs. Second Av. R. R. Co.*

Assignment of Rights of Action.—One who has conveyed real estate to another, by deed, and who has a right of action against the grantee, to have the conveyance declared void and set aside, on the ground of fraud, undue influence, inadequacy of price, &c., cannot, without possession or a present estate or interest, assign such right of action to another, e. g. to a trustee for creditors, so as to enable the assignee to bring an action in his own name to set aside the conveyance: *McMahon vs. Allen.*

Action to Enforce Rights acquired under a Foreign Bankrupt Law, &c.—Our courts will not recognise or enforce a right or title acquired under a foreign bankrupt law, or foreign bankrupt judicial proceedings. Accordingly, *held*, that an action could not be brought in the courts of New York, by trustees of the estate and effects of a firm declared by the Tribunal of Commerce of the City of Brussels, in Belgium, to be insolvent and bankrupt, to recover the possession of goods and chattels in the possession of the defendant, in this State, the title and right of possession of which is claimed to have passed to the plaintiffs under and by virtue of such bankrupt proceedings: *Marrelman et al. Trustees, &c., vs. Caen.*

Insuring Ship owned by several persons as Tenants in Common.—Each owner of a ship has a distinct and separate interest as a tenant in common, and he may or may not insure his particular share, as he thinks fit. He is under no obligation to insure for the benefit of the others, or to unite with them in insuring: *McCready et al. vs. Woodhull et al.*

If one joint-owner gives authority to an agent to insure for him, it necessarily means to insure his share; and in order to make him liable jointly with the other owners, for a premium on a policy for the whole vessel, the proof must be clear that he gave express authority for that purpose: *Id.*

If a ship's husband insures the vessel, it must be by a special authority, it not being a part of his general duty to insure: *Id.*

Instructions from all the owners, to insure, will only authorize a ship's husband to insure for each separately, to the value of his separate interest: *Id.*

Articles of Co-Partnership, when Evidence—Rights of Vendor in Case of a Fraudulent Purchase on Credit—Proof of Execution of Sealed Instruments.—Upon an answer setting up the non-joinder of other persons as co-defendants, articles of co-partnership are admissible to prove a partnership between the defendants and the persons omitted. But where the answer alleged that two persons not joined were partners of the defendants, and the articles produced showed that there was only one partner not joined, it was held that the articles were properly excluded: *Keyser vs Sickel*.

Where vendors have been guilty of a fraud, upon a purchase of goods on credit, the vendor may, without waiting until the time of credit has expired, reclaim the goods, or he may waive the tort, and recover in assumpsit for the value: *Id.*

A party to an instrument under seal, to which there is a subscribing witness, is not a competent witness to prove its execution: *Id.*

To lay a foundation for the admission of any other evidence than that of the subscribing witness, it is necessary to prove that the latter was not capable of being examined, or that he was dead, or incompetent to give evidence, from insanity, or infamy of character, or absence in a foreign country, or that he could not be found: *Id.*

Broker's Commission.—Although a broker's compensation is earned on the completion of the service, which terminates when the vendor and vendee have agreed, yet there must be arrangement by which the parties are legally bound: *Barnard vs. Monnot*.

On a negotiation for the sale of real estate, the parties must agree upon the terms, and the contract must be formally reduced to writing and executed by them, before the broker will be entitled to his commissions: *Id.*

Service by Publication—Affidavit to Obtain Order.—The statutory proceedings for acquiring jurisdiction of absent defendants must be strictly complied with. Jurisdiction can only be acquired in the mode prescribed by the statute: *Cook vs. Farren*.

Where an order for the service of the summons upon an infant residing in California was granted upon an affidavit, which did not show that the residence of the infant was unknown to the plaintiff and could not be ascertained, it was held that the infant defendant was not properly served with process, so as to give a good title to a purchaser at a sale under the judgment: *Id.*

THE
AMERICAN LAW REGISTER.

DECEMBER, 1861.

ON THE INTERVERSION OF POSSESSION;

OR,

WHETHER A PARTY MAY CHANGE THE CAUSE OF HIS POSSESSION.

It was a rule of the Roman law, that a man who was in possession under a title emanating from another, might not make intervention, and commence to hold independently of the title to which his holding was subordinate, *cum nemo causam sibi possessionis mutare possit*.¹ No man might change the cause of his possession, and hold adversely to the right under which he entered, unless the character of his possession was changed by some cause without. There could be no intervention, *nulla extrinsecus accedente causa*.

Savigny² is of opinion that the rule in question had not been properly understood by most writers, especially before the discovery of the Institutes of Gaius. He says that it seems to have been supposed that the rule rendered it absolutely impossible, even with the co-operation of a third party, to change the cause of possession, though such is not the meaning of the rule; for if the possessor in bad faith of a thing, purchase it of the proprietor, or of him whom he supposed to be such, the cause of the possession is completely

¹ L. 5, Code de Acq. Poss. ² Tr. de la Poss., p. 69, Edition of 1842, Paris.
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and effectually changed; and, on the other hand, if the tenant expels the lessor, he has effectually changed the cause of possession from the *causa conductionis* to the *causa dejectionis*, and will thus arrive at true possession. The rule opposes no obstacle to such a change, and there was no necessity for a positive prohibition, for the lessor is sufficiently protected by the interdict *de vi*, and the expulsion or ouster could never, by the Roman law, be a step to *usucapion*. The rule, therefore, he considers applicable to those few cases where an unjust and arbitrary cause might be changed to one which was valid and efficacious, but where *usucapion* was prevented by the application of a rule altogether positive in its nature, as in the following cases. Before the heir has taken possession of the things belonging to the succession, any one might take possession of those things and acquire title by *usucapion* as heir, (*pro herede*.) For *usucapion* in such a case, by the Roman law, neither good faith nor a just title being required, one year only was necessary to its accomplishment, even for immovable property. This, therefore, was a cause of possession to which the positive rule of prohibition was applicable, for it was founded upon a dishonest intent of the party taking possession, and was nevertheless a just cause of *usucapion*, *justa usucapionis causa*, which distinguished it entirely from the case of a lessor expelled by his tenant. The reasons for the recognition of a possession so unjust, and of the *usucapion* founded therefrom, were special, and the law itself was changed by Adrian.

The ancient rule, *nemo sibi causam possessionis mutare potest*, applied in the following manner. If one was in possession as a purchaser, (*pro emptore*,) and was in the course of acquiring title by *usucapion* in that character, or if he had natural possession of a thing as depositary or bailee, on the death of the true proprietor, *usucapio pro herede*, *usucapion* in the character of heir, might be of great advantage to each of these possessions. The purchaser of immovable property acquired title in one year, instead of two, which were necessary in his character of purchaser, and the depositary or bailee, to whom in that character *usucapion* was impossible, was thus enabled to acquire a right by *usucapion*. The rule *nemo, &c.*,

that no one may change the cause of his possession, might be opposed to such possessions. Those who had once commenced to possess in a certain manner, were not permitted, with a consciousness of its unlawfulness, to change that possession to a *possessio pro herede*. Such, according to Savigny, was the design of the rule in question, though he admits that it has entirely lost its true signification since the time of Justinian. The rule by which possession at the common law is affected, and which is far from being understood as an arbitrary or positive rule, is the same which was applicable, under the law of Justinian, to prescription *longissimi temporis*, or cases of possession for thirty years, and the principle of the rule still applies to possession which commences lawfully and in subordination to title.

The meaning of the rule is, that a man shall not change, by his own act, the character of his possession, so as to give effect to usucapion or prescription. That a tenant, who entered under a rightful title and acknowledged the authority of his lessor, might acquire possession by the simple act of expelling his lessor, although he could not, by the old law, render possession thus acquired available to usucapion, is sufficiently apparent from the texts of the Digest.¹ Possession, says Cujas, does not require good faith, though usucapion demands good faith.² Possession is not always available to usucapion.³ Although violence prevents alike usucapion and prescription *longi temporis*, it does not obstruct prescription *longissimi temporis*, where there has been a possession of thirty years after the act of violence has ceased.

The lessee, therefore, who had, under certain circumstances, acquired the possession of land leased to him by violence, that is, by holding out the lessor and denying his title, acquired an absolute right by the law of Justinian, after a possession of thirty years.

The rule in question has application to all cases at the civil law, or the common law, in which prescription may be effectual, though not founded upon a title commencing in good faith.

The principle of the rule is independent of any positive regula-

¹ D. 43, 12, 16, and 18.

² Cujacius, vol. 3, p. 286, ch. 12.

³ Cujacius, vol. 6, p. 668.

tion; it is that a person who has acquired a possession subordinate to another's right, shall not, by the act of his own mind, change the character of that possession, and at his own election hold independently and adversely.

"The sense of the rule," says D'Argentrée,¹ "is that no man shall mentally, alone, and by a silent thought, change the cause of his possession—that is, elect to hold for a different cause from that for which he had previously held." "So no man, by his intention alone, can change the nature of possession which he has received to hold in another name; for example, if a tenant should resolve to make no further payment to the owner of whom he held, no interversion of possession is effected by the operations of his own mind. Some act is necessary."

Intervention is effected by a conveyance from the owner of land to his tenant, who thereafter will hold in virtue of the extrinsic cause contemplated by the rule, and also when the land comes to the tenant by descent.

The cause of possession may also be changed by a conveyance from a third person claiming to be the owner of the land. If the tenant is aware that the person from whom he thus derives title, is not the true owner, he will be a possessor in bad faith, but he may prescribe after thirty years by the civil law.²

The question has been considered by French writers, whether after such a conveyance from a third person to the tenant, some refusal or act equivalent to an expulsion was necessary, in reference to the owner, to mark a change in the character of the possession. Dunod³ says, that if the tenant refuses, after a title thus derived, to yield any part of the profits to the owner, if he declares to him that he will no longer hold the land under him, but that he will enjoy the land as his own, this will be a change in the character of the possession by an extrinsic fact, unjust indeed, but which, nevertheless, is the commencement of a possession, the cause of which is changed for him, but not by himself.

¹ D'Argentrée, art. 265, ch. 4, p. 863.

² D'Argentrée, art. 265, ch. 4, Nos. 29 and 30.

³ Dunod, Tr. des Prescriptions, p. 86.

S'il refuse après cela de faire part des fruits à son maître; s'il lui déclare qu'il ne veut plus tenir de lui ces héritages, mais qu'il en veut jouir comme des siens propres, ce sera un changement de possession par un fait extérieur, injuste à la vérité, mais qui ne laissera pas de donner commencement à la possession, quia non sibi mutare sua ipsi mutari dicetur causa possessionis.

The acquisition of a new title, it would seem, was not considered by this writer as sufficient to effect an interversion, unless with a refusal on the part of the tenant to account for the profits. A denial of the right of the owner, as well as a new title, was supposed necessary to change the cause of possession. Troplong controverts this notion,¹ and is of opinion that a denial of the right and a refusal to account is important only as giving publicity to the newly acquired title, and as excluding the vice of clandestinity. The title, he says, is only effectual when it is sustained by a possession which is neither equivocal nor clandestine. It is necessary, in order to effect a change in the character of the possession, that the owner should have notice of the new title. If the tenant permits the party, in subordination to whose right he had possession, to remain in ignorance of the conveyance, the cause of the possession will not be changed, but if he communicates that fact, or if the publicity attending his title and claim are such as to make them known to him, no express refusal to account, or denial of the right of the owner is necessary, because the title itself is supposed to be the cause of interversion, and this, when publicly asserted, is in itself a denial of the right under which the possession had commenced. In support of this view, Troplong cites the provisions of the French Code, by which a conveyance, emanating from a third person, and contradiction or a denial of right are made distinct and independent causes of interversion. Whereas, if contradiction in express terms had been necessary, that would have been declared to be the single cause of interversion.

Contradiction, or a refusal to account and a denial of the right of the person of whom possession had been held, is in itself a mode

¹ Troplong, Tr. de la Prescription, No. 507.

in which the cause of possession may be changed. Such an interversion is not inconsistent with the rule above stated. The act is an extrinsic one, though emanating from the tenant, and by changing the relations of the parties creates a new and independent possession.

A possession thus commencing, though unjust and fraudulent, is recognised at the French law as the foundation of prescription *longissimi temporis*, or thirty years.

The appropriation of the entire profits of the land by the tenant, and the omission to pay or account, is not regarded as sufficient to work a change of the possession, and the words of D'Argentrée on this subject, are noticeable as in striking conformity with the doctrine, as stated by Lord Mansfield, as the rule in regard to ouster of one tenant in common by another.

"A simple refusal," he says, "does not constitute a ground for the commencement of prescription, but only when on the demand by the lessor, the tenant refuses to pay and asserts his right to possession, with acquiescence on the part of the owner. That is, without his commencing an action for thirty years."

The act of the tenant in asserting his right is regarded as constituting a change of possession. A mere cessation of payment produces no such effect as a refusal to pay, and a denial of right, because the cessation of payment may be ascribed rather to the forgetfulness of the owner, than to the act of the tenant in assertion of right.

The denial of the right of the owner, as well as the omission to pay, is necessary to a change of possession. A tenant, says Dunod, to do this, must, on the request of the owner, not merely omit to perform the duties required, he must say at the same time that he is not subject to them.¹

In regard to the manner in which contradiction or the denial of the right of the owner may be made, the question has arisen, whether mere words were sufficient, unless in writing, and whether a claim in writing is in all cases necessary. Troplong states a

¹ Dunod, p. 87.

case where the acts of the tenant in possession are in themselves sufficient to constitute a claim of right, and a denial of the title of the owner, as follows :

If a person to whom permission has been accorded to feed his cattle by the owner, *à titre de precaire*, or as tenant at will, on uncultivated land, is at length informed by him that the permission is withdrawn, and notwithstanding the tenant afterwards persists in his occupation, and throws down the enclosures which the owner had erected for his exclusion ; these are, in themselves, acts of possession, which, whilst they manifest a claim of right, involve a denial of the right of the owner. No such effect could be given to a merely oral communication, though these may be important as giving a character to acts which would otherwise be equivocal, such as a neglect or refusal to pay rent, or to account for the profits of land.

There is nothing in the rule in question which prevents a tenant, who is in possession under an executed contract, from acquiring a new possession by a conveyance from a third person, or from transferring the land to another, who may thereafter commence to hold adversely on a distinct possession.

The only principle which prevents a tenant from changing his possession and acquiring a right to land by prescription, is the effect of the contract which may exist between him and the party from whom he derives possession ; and the only contract which can have that effect, is one which imposes a duty upon the tenant to be performed at a future time. Such a contract is inconsistent with a new and independent possession, and its effect is to prevent the tenant from acquiring title by prescription, or from commencing to prescribe while the contract is executory. The possession of a tenant for years, is always held under an executory contract. The contract on his part is to occupy the land as lessee during the continuance of the term, and at its end to deliver up the land to the owner. A tenant for years may acquire title from a third person to land of which he is in possession under a lease, and he may hold the land against his lessor by a title thus derived. But he will hold by title, and not by prescription, on a possession

commencing under his independent title. If he cannot sustain his claim of right by his new title, he cannot avail himself of an adverse possession, commencing at the time of the supposed conveyance. The contract controls his possession and renders it the possession of the owner.

Though the possession of a tenant for years cannot be changed, except by a paramount title derived from a third party, there is no principle which, on the conveyance by such a tenant of the land held by him for a term of years, prevents the purchaser from acquiring a new possession that will in time ripen into title.

The effect of the law in question was not to prevent the alienee of a tenant for years even from transferring such a possession as might be the foundation of prescription. Cujacius says, that if a tenant sells the farm which he holds as his own, though the sale is unlawful, by reason of the principle that a man may not change the cause of his possession, there is no doubt that a *bona fide* purchaser may prescribe for it, though he bought it of a vendor who was in bad faith, but the true owner may recover the land, if the purchaser has not acquired a right by prescription.¹

The sale by a tenant for years, to be effectual, as changing the cause of possession, must be a transfer of property, and such as leaves no privity between the vendor and purchaser, otherwise it will operate only as an assignment of the tenant's interest, and the possession of the assignee will be that of the owner. Such is the doctrine of the French law,² and in this respect it is in perfect accordance with the common law, notwithstanding the peculiar effect which a feoffment has been supposed to have by the latter. A feoffment by a tenant for years, as by any other party in possession, operates to create a new possession in the feoffee, and as against third parties, this is its only effect. Such a possession may be adverse at the common law, and give effect to the Statute of Limitations, just as it would be a foundation for the prescription of thirty years by the civil law.

¹ Cujacius Recit. Solemn, Sur le Code de acq. poss.

² Troplong, Tr. de la Prescr., No. 516.

As against the feoffor, a feoffment transferred the freehold; but as against the true owner, says Bracton,¹ there will be no freehold, except by long and peaceable seisin, and if immediately after the feoffment, the true owner can acquire seisin, he may hold all others out of possession. *Sed quod verum dominum, nunquam erit liberum tenementum, nisi ex longa et pacifica seisina et unde si incontinenti post tale feoffamentum posset verus dominus ponere se in seisina, omnes quoscunque tenere posset exclusas a possessioni.* And, although it was held by Lord Mansfield, that on a feoffment by a tenant for years, the lessor might elect to consider himself as not disseised, "and still distrain for the rent, or charge the person to whom it is paid as a receiver;"² some action by the lessor is necessary to manifest his election, for if the lessor permits the feoffee to remain in possession, he will, on the foundation of that possession, acquire a freehold. This is clear from what fell from his lordship, on the effect of fines with proclamations. By a fine with proclamations, the right of the true owner is extinguished, as he says, "for the sake of the bar." Fines are a species of statutes of limitation. It is sufficient for the operation of a fine that the feoffee of a tenant for years has a freehold as against the feoffor. Such a possession the feoffee has, under the Statute of Limitations.

The doctrine which was urged in that case, that the feoffee might be a good tenant to the precipe in a common recovery, was, that substantially the feoffee had an indefeasible right of property which was capable of being passed by a common recovery.

A tenant for term of years, who is bound by his contract to hold for the owner during the term, and at its end to deliver up possession, may as effectually change his cause of possession by a conveyance to a third person, as a tenant, who holds *ex precario*, and whose liability results from his tenure alone. If the tenant for a term of years refuses to pay rent, and claims title, and expels the owner on his entry to claim performance of covenants, he is guilty of a forfeiture which may render him liable to an

¹ Bracton, Lib. 2, ch. 14.

² Taylor *vs.* Horde, 1 Burr., 60.

action of ejectment, but he acquires no possession, because the lessor may waive the forfeiture and demand performance of the covenants by the lessee. Having this election to waive the forfeiture and insist upon performance, some act on his part is necessary to show his election to take advantage of the forfeiture, and the mere wrongful act of the tenant will not initiate a new possession in himself. Such is the necessary effect of the contract on the parties, and in this respect there is a distinction between the tenant and his feoffee, who is a disseisor, but only at the election of the lessor. In the one case the possession is controlled by a contract; in the other merely by tenure. The feoffee of a tenant for years is in privity of estate, and not in privity of contract.

Though, on an act of forfeiture by a tenant for years, the lessor has his election, and on his waiver of the forfeiture, the possession of the tenant will continue to be the possession of the lessor, it is quite otherwise with a tenant at will, and any act of forfeiture by such a tenant immediately puts an end to the tenancy of the latter.

Where a tenant for a term of years under a lease, delivered up possession of the premises and the lease, in fraud of his landlord, to a person who claimed under a hostile title, with a view to enable him to set up his hostile title; this was held to be a forfeiture, of which the landlord might take advantage.¹

In another case,² where a tenant for a definite term of years, on a demand of rent, orally refused to pay it, and asserted that the fee was in himself, the Court of King's Bench distinguished the case from the preceding one, on the ground that, in that case, the tenant had betrayed his landlord's interest by an act that might place him in a worse condition. They were of opinion that a lease, for a term of years, could not be forfeited by an oral disclaimer, although a tenancy from year to year might be thus determined. Lord Denman said, "When a landlord brings an action to recover the possession from a defendant who has been his tenant from year to year, that evidence of a disclaimer of the landlord's title by the tenant, is evidence of the determination of the will of both parties,

¹ *Ellenbrock vs. Flynn*, 1 Cr. Mees. & Ros., 187.

² *Doe ex d. Graves vs. Walls*, 10 Ad. & El. 427.

by which the duration of the tenancy, from its particular nature, was limited." His lordship thought the word "forfeiture" was improperly applied to such a case, as the supposed forfeiture absolutely put an end to the tenancy in such a case. Several cases were referred to on the argument, to show that the effect of a disclaimer was to create a forfeiture of the estate for a term of years; but they were all distinguished by the Court from the case in question; as of estates from year to year, and as such determinable at the will of the parties. Thus, it was held, that if a tenant hold from year to year, the landlord cannot maintain an ejectment without giving six months' previous notice, unless the tenant have attorned to some other person, or done some other act disclaiming to hold as tenant to the landlord; and in that case no notice was necessary.¹

In another case, Lord Kenyon said, that if the tenant put his landlord at defiance, he might consider him either as a tenant or trespasser, and eject him without any notice to quit.²

When the tenant holds from year to year, the court said in a case where the claim of the tenant was not considered as necessarily inconsistent with the tenancy, "it does not appear to be necessary that any act should be done, as distinguished from a verbal disclaimer; a disavowal by the tenant of the holding under the particular landlord, by words only, is sufficient." In such a case, the disavowal determines the estate.³

So it was held,⁴ that a tenancy, from year to year, was determined by the tenant having written a letter to the reversioner's attorney, stating that his connection as a tenant had ceased for several years.

If a tenant at will disclaims that relation to his landlord, this is a renunciation by the party (of his interest and) of his character of tenant, either by setting up a title in another or by claiming a title

¹ *Throgmorton vs. Whelpdale*, Bul. N. P., 96.

² *Doe vs. Pasquali*, Peake's N. P., 196.

³ *Doe d. Gray vs. Stanion*, 1 M. & W., 695.

⁴ *Doe d. Grubb vs. Grubb*, 10 B. & C., 816. See also *Williams vs. Cooper*, 1 Man. & Gran. R., 189.

in himself. By such an act the tenant does not change the cause of his possession, in the sense that he might otherwise presumptively hold under the agreement by which the tenancy was created, but he puts an end to his tenancy. He no longer holds permissively, but as a wrongdoer, and, if the owner permits him, thus claiming adversely, to continue in possession during the period of limitation, he is barred of his right.

In a case¹ where the widow of a testator, to whom he had devised the estate in question, and the younger of two sons joined in a deed of bargain and sale, conveying the estate in fee to H., without the privity of the eldest son and heir at law of the testator, and H. continued in undisturbed possession of the estate for twenty-two years, and died possessed, bequeathing it to his children; it was held that the possession of H. was not a disseisin to the eldest son and heir. "I think," said Abbott, C. J., "there is no ground for saying that the adverse possession of H. has operated as a disseisin (of the heir). H. did not take possession wrongfully; he only wrongfully continued possession. He came in under right and title, which remained good during the life-estate of the widow, but ceased at her death, and from that period he continued in possession wrongfully. But what is the effect of that? No more than that he is tenant by sufferance (to the heir), who permitted him for a period to remain in possession." "I know of no authority," he proceeds, "which says that a mere wrongful possession divests the estate of the party against whom the possession is adversely held. If the argument is to be carried to that extent, a mere adverse possession might be made equivalent to a fine and feoffment." But there was really in this case no adverse possession. The party entered rightfully under the conveyance from the tenant for life. Although he entered under a conveyance which purported to pass an estate in fee, his estate and his possession were, by operation of law, reduced to such as he might rightfully claim. His possession, after the death of the tenant for life, being qualified by construction of law, notwithstanding the claim under which he entered, continued subordinate to the right of the true owner, and therefore was not, properly

¹ Doe d. Souter vs. Hall, 2 Dowl. & Ry., 88.

speaking, adverse. There was no act of disclaimer by the tenant at sufferance after he became such, and, though he died in possession and bequeathed the land to his children, this was not such an act as might change the cause of his possession. This was the very case to which the rule of the civil law applied. There was no extrinsic act to change the cause of his possession, and his intention to hold adversely could not have effect consistently with the principle of law, which made him merely a tenant at sufferance. If there had been any act putting an end to his rightful possession, after the death of the tenant for life, this might have been sufficient to render him a disseisor.

The following case is an instance, where, as in a tenancy for a term of years, there could be no interversion, because the party in possession was prevented from changing the cause of his possession by the effect of a covenant which bound him in equity, and prevented him from setting up an adverse possession, and which would have prevented him from changing the cause of his possession by the operation of any extrinsic act.

In a case where certain devisees under a will, covenanted to carry the supposed intention of the testator into effect in favor of the heir, to what became a lapsed devise, by the death of a person to whom a certain share had been devised. Although they had the legal estate, and continued in possession more than twenty years, their possession was not adverse, and the Court were of opinion that they would have been guilty of a breach of trust if they had prevented the rents from being received for the party entitled.¹

In this case, the possession was prevented from becoming adverse by the covenant which controlled its character, and even if the parties had claimed to hold discharged of the covenant, they would have been held liable in a court of equity, subject only to the rules of that court on a long-continued possession.

The doctrine of Lord Redesdale,² that the attornment of a tenant for a term of years to a stranger, by which the possession is betrayed, gives the stranger adverse possession against the lessor, is

¹ *Coolough vs. Halse*, 8 B. & C. 757.

² *Hovenden vs. Lord Annesley*, 2 Sch. & Lefr. 624.

not inconsistent with the rule which prevents the tenant from changing the qualities of his own possession. The attornment of the tenant is to be regarded, in such a case, as having the same effect as a wrongful conveyance by the tenant. The tenant does not, by such an act, change the cause of his own possession; but the design of his act is to make his own possession that of the stranger to whom he attorns.

Lord Redesdale observed, that the attornment of a tenant "will not affect the title of his lessor, so long as he has a right to consider the person holding the possession as his tenant. But as he has a right to punish the act of the tenant in disavowing the tenure, by proceeding to eject him, notwithstanding his lease, if he will not proceed for the forfeiture, he has no right to affect the rights of third persons, on the ground that the possession was betrayed; and there must be a limitation to that, as to every other demand." "The intention of the statute of limitations," said his lordship, "being to quiet the title of lands, it would be curious if a tenant for ninety-nine years, attorning to a person, insisting he was entitled, and disavowing tenure to the knowledge of his former landlord, should protect the title of his original lessor for the term of ninety-nine years. That would, I think, be too strong to hold, on the ground of the possession being in the lessee after the tenure has been disavowed to the knowledge of the lessor. If the tenure has not been disavowed to the knowledge of the lessor," he said, "it was different," and referred to a case "where there had been a lease for sixty years, and no rent paid for many years, and at the expiration of the lease it was insisted, that as no rent had been paid the tenant could not be evicted by the person entitled to the reversion; but it was held, that as the tenant entered originally under the lease, and his possession was lawful as against his lessor, who was entitled to all his remedies for the rent, there was no disavowal of the tenure. But that if he had attorned, with the knowledge of his lessor, to another, so that there was a disavowal of tenure for that time, he was of opinion that the same doctrine could not be sustained. If in the case referred to by his lordship, there had been a disavowal of tenure during the whole time of the lease,

this would not have affected the right of the reversioner to enter at the end of the term for years, for if such a disavowal is to be regarded as a forfeiture, it might be waived without impairing the right as between the parties.

Lord Redesdale, in this case, contemplated the attornment of the tenant as an act designed to transfer the possession to a stranger, and as such depending for its efficacy upon knowledge of the attornment being brought home to the lessor.

There was nothing in the terms of the contract between the lessor and the lessee, which could prevent the attornment of the tenant from giving the stranger possession by the ministry of the lessee. The attornment was to be regarded as having the same effect as if the tenant had abandoned possession to a hostile claimant. It thereupon became necessary for the lessor to enter upon his tenant for a forfeiture, for the same reason that his entry upon a stranger in actual possession would be necessary. No act of the tenant could have any effect upon the possession, so as to change the relations of the parties, as between themselves, because that was controlled by an agreement which had not only a present but a prospective operation upon his possession. The only question in the case decided by Lord Redesdale, related to the effect of the attornment. If that was sufficient to constitute the party, to whom it was made, in possession, that possession being hostile, was capable, by length of time, of ripening into title.

The question was considered and discussed in a leading case on this subject, by the Supreme Court of the United States.¹ In that case, the tenant, by agreement with the owner of the land, entered upon the premises as an agent, and with authority to sue trespassers, and protect the possession of the owner. He thus became a tenant at will. Afterwards, the tenant claimed to hold the land by an adverse title, and the owner had notice of the adverse claim. The tenant, and those claiming under him, continued in possession more than thirty years. The Court held, that the disclaimer determined the tenancy as to the owner, and that from the time it was

¹ Williston vs. Watkins, 8 Peters B. 48.

made, he had a right to eject him as a trespasser. This decision was in perfect conformity with the principle above stated ; but the learned judge who delivered the opinion of the Court, considered the case the same as if the tenancy had been for a term of years, and seemed to suppose that the disclaimer of such a tenant would necessarily work a forfeiture which must put an end to his estate, and make his subsequent possession adverse.

After considering the facts which constitute a disclaimer with the knowledge of the owner, and its effect, Baldwin, J., said: " Having thus a right to consider the lessee as a wrongdoer holding adversely, we think that, under the circumstances of the case, the lessor was bound so to do. It would be an anomalous possession which, as to the rights of one party, was adverse, and as to the other, fiduciary. If after a disclaimer with the knowledge of the landlord, and attornment to a third person, or setting up a title in himself, the tenant forfeits his possession and all the benefits of the lease, he ought to be entitled to such a result from his known adverse possession. No injury can be done to the landlord unless by his own laches. If he sues within the period of the act of limitations he must recover ; if he suffers the time to pass without suit, it is but the common case of any other party who loses his right by negligence and lapse of time. As to the assertion of his claim, the possession is as adverse and as open to his action as one acquired originally by wrong ; and we cannot assent to the proposition, that the possession shall assume such a character as one party alone may choose to give it. The act is conclusive on the tenant. He cannot make his disclaimer and adverse claim, so as to protect himself during the unexpired term of the lease. He is a trespasser on him who has the legal title. The relation of landlord and tenant is dissolved, and each party is to stand upon his right."

Now, if it were true that an oral disclaimer would be sufficient to work a forfeiture of a definite term for years, it is plain that the lessor might treat the disclaimer as a forfeiture or not, at his election ; and for the obvious reason, that the relation between the parties is created by a contract executed only in part, and by which

the tenant binds himself to hold as lessee during the whole term, and at its determination to deliver up the land to the lessor. Of this obligation, the tenant cannot discharge himself by his own wrong, although the wrong may, by working a forfeiture, give the lessor another remedy, which is independent of the contract. If, in every case of forfeiture, the lessor were bound to enter, the tenant would be furnished with an easy discharge from a contract on which he had received a partial benefit, and the onerous duties of which remained to be performed. There is not, as is suggested, anything anomalous in the character of the possession after an act of forfeiture, which does not necessarily put an end to the estate. The possession is not, thereafter, as to the rights of "one party adverse, and as to the other fiduciary." If the lessor enters for a forfeiture, the possession of the tenant is at an end; if he elects to waive the forfeiture, the possession and the relative rights of the parties are the same as before the act was committed.

But an oral disclaimer would not work a forfeiture of an estate for years, and in the case in question the disclaimer had the effect of determining the tenancy, because it depended upon the will of both parties, and could not subsist after a disclaimer by one of them.¹

S. F. D.

(To be continued hereafter.)

RECENT AMERICAN DECISIONS.

In the Court of Appeals of the State of New York.

THE PEOPLE, EX REL. THE BANK OF THE COMMONWEALTH, vs. THE COMMISSIONERS OF TAXES AND ASSESSMENTS FOR THE CITY AND COUNTY OF NEW YORK.

- 1 Stock in the public debt of the United States, whether owned by individuals or by corporations, is taxable under the laws of the State.
- 2 The taxation, by the State, of property invested in a loan to the Federal Government, is not forbidden by the Constitution of the United States, where no unfriendly discrimination to the United States, as borrowers, is applied by the

¹ See *Graves vs. Wells*, 10 Ad. & El. 427.

State law, and property in its stock is subjected to no greater burdens than property in general.

3. Whether Congress, for the purpose of giving effect to its powers to borrow money, and of aiding the public credit, may constitutionally enact that a stock to be issued by the Federal Government shall be exempt from taxation, *quære*.
4. The cases of *McCullough vs. Maryland*, 4 Wheat. 116; *Osborn vs. United States, Bank*, 9 Wheat. 738; and *Weston vs. The City of Charleston*, 2 Pet., examined and distinguished.

Appeal from a judgment of the Supreme Court.—The Court, upon the application of the Bank of the Commonwealth, awarded a *certiorari* to the Commissioners of Assessments and Taxes of the city and county of New York, for the purpose of reviewing their proceedings in assessing that corporation, in the year 1859. It appeared from the admissions in the return of the commissioners, that the Bank of the Commonwealth was a banking association organized under the general banking law, with a capital actually paid in of \$750,000, out of which it had paid \$188,834 84 for real estate, consisting of its banking-house, leaving \$561,165 16, of which \$103,000 was invested in the stock of the public debt of the United States, of the loan of 1858, which was actually owned by the corporation at the time the assessment was made. The bank claimed, before the commissioners, that the stocks of the United States were exempt from taxation under the Federal Constitution, but that Board held otherwise, and assessed the corporation for personal estate for the whole balance of capital after deducting the sum paid for real estate, and it was taxed thereon. The Supreme Court held that the stocks referred to were not exempt from taxation in this case, and affirmed the assessment; upon which the present appeal was brought by the Bank.

Alexander W. Bradford, for the appellants.

Greene C Bronson, for the respondents.

DENIO, J., (after discussing certain questions of a statutory nature, and of local interest,) proceeded as follows:—

The question then arises, whether the public debt of the United States is exempt, by the Federal Constitution, from taxation under

the general laws for the assessment and collection of taxes which are in force in this State. It is essential, in the outset, to have a clear perception of the principles upon which taxes are imposed under our State laws. We do not select particular subjects of taxation, and, upon motives of policy, burden these with the public contributions, or a disproportionate part of them, in exoneration of the other property of the citizen. The rule, on the contrary, is to tax every person for all the property he possesses. This doctrine is announced at the commencement of the chapter of the Revised Statutes, respecting taxation: "All lands, and all personal estate, within this State, whether owned by individuals or by corporations, shall be liable to taxation, subject to the exemptions hereinafter specified:" 1 R. S., 387. The exceptions are inconsiderable, and only tend to prove the universality of the principle. And there is no artificial rule of valuation, by means of which a discrimination can be made in favor of or against any particular species of property. The real estate is to be assessed at its full and true value, and that at which the assessors would appraise it in payment of a just debt due from a solvent debtor; and the personal estate is to be set down at its full and true value, over and above the amount of debts due from the person assessed. Laws of 1851, ch. 176, § 8. If, therefore, the stock in question is assessable at all, it is to be included in the mass of the tax-payer's property, and is to be set down at what it is really worth, in the same manner as every other item of his taxable property. It is not taxable by name, and there is no discrimination in favor of or against it, but the bond or script which furnishes the evidence of the title is regarded like any other security for money.

Having premised thus much, the question recurs, whether there is anything in the Constitution of the United States which, by a fair interpretation, forbids the States, under their tax laws, from including in the aggregate valuation of the tax-payer's property, in respect to which he is to be taxed, money which he has lent to the Federal Government, for which he holds its evidence of indebtedness. It is the Constitution alone which is to be looked to, for Congress has never passed any statute on the subject. That body

has from time to time authorized the executive department to borrow money, to fix the rate of interest to be paid, and to pledge the public credit for its payment ; but it has not undertaken to restrain or limit the taxing powers of the State Governments in respect to the money lent or the script or securities to be issued upon such loans. It has said nothing on that subject. If there is any such restraint or limitation, it exists in the Constitution itself. Among the attributes conferred upon Congress by that instrument, is the power "to borrow money on the credit of the United States." Art. 1, § 8. Then the Constitution declares that itself, and the laws made pursuant to it, and the public treaties, shall be the supreme law of the land, and paramount to the State Constitutions and laws: Art. 6, ¶ 2. It may be safely admitted that any Act of a State Legislature, forbidding, or placing any substantial obstacles in the way of negotiating, Federal loans from the citizens of such State, would conflict with the Constitution. As the constitutional power to borrow money does not declare that it shall be procured within the Union, or from citizens of the United States, there is, perhaps, no corresponding duty on their part to lend. Nor was it intended that any such duty should be imposed. No enabling power in respect to the lender was required. Nothing was necessary but that the political corporation, which it was proposed to establish, should be endowed with the faculty of borrowing on the public credit. As to the rest, the money markets of the world were looked to for furnishing the other parties to the contract of lending. An unfriendly act of legislation, which should exclude the Federal Government from resorting to the money markets of a particular State for loans, though it might not seriously affect the exercise of the borrowing power elsewhere, would be so obviously hostile to the operations of the Government, that I am confident it could not be sustained ; and such is, no doubt, the effect of the judgment of the Supreme Court of the United States in the case to be presently mentioned. But our laws for the assessment and collection of taxes, supposing them to include shares in the public debt of the United States along with other personal property of the citizen, leave the Federal Government in precisely the same condi-

ties with any other borrower. It was the practice of independent governments, as well as of municipalities and trading corporations, anterior to the Constitution, as it is now, to borrow money in their own or in foreign States. The citizens of the several States, though not at that time lenders in such loans to any considerable extent, were capable of becoming such. They might lend money to the Federal Government, to the State Governments, to foreign nations, and to individuals. As to none of these, except the United States, is there any pretence that the State Legislature was obliged to waive the right of taxing the lender for his property in the obligation taken to secure the repayment of the money loaned. In like manner, the Government of the United States possesses the same power to borrow in the marts of the old world as of its own citizens. But the foreign lender would of course be subject to the laws, as to taxation, prevailing in the country of his domicil. The claim, therefore, which is now interposed on behalf of the Federal Government, is of a right to present itself as a borrower in the money markets of this State, in a different and far more favorable position than our own State Government occupies when it has occasion for a loan, and, of course, than that which other borrowers, public, corporate or private, foreign or domestic, can pretend to. It is, moreover, the claim of a right to impose upon the Legislature of the State disabilities in respect to the taxation of moneys loaned to the United States, which there would be no pretence for challenging against any foreign country to which they might resort for the negotiation of loans. The claim is not supported by any specific language in the Constitution pointing to such consequences, nor, as we have said, by the terms of any statute, but simply upon the power to borrow money upon the public credit conferred by the Constitution. Such a power, conferred by such general language, seems to us fully satisfied, so far as the State Governments are concerned, when no unfriendly discrimination towards the United States, as borrowers, is applied by the State laws; when the General Government is admitted to negotiate upon the same terms as other borrowers, public or private, with such of our citizens as may choose to become lenders of money, and when they

are placed on the same precise footing, in all respects, as all other borrowers, *primâ facie*, the provision simply confers upon the Government a capacity to become parties as borrowers upon the public credit, to a contract of loan. If it had been intended, beyond this, to give them, in the States of the Union, an advantage over all other borrowers, it is certainly remarkable that more explicit language was not used. We give no opinion on the question, whether Congress could enact a law by which the lenders of money to the Government should enjoy the advantage of exemption from State taxation in respect to such loans. Events may occur—perhaps they have already occurred—when the preservation of the Constitution and the continuance of the Union may depend upon the ability of the Government to obtain a seasonable supply of funds, and we would not unnecessarily interpose a *dictum* which would appear to circumscribe any powers which it may possess. But in the absence of any such statute, and resting upon the general grant of power contained in the Constitution, we are of opinion that the claim to be exempt from taxation cannot be allowed to prevail.

The argument in favor of exempting the holders of Federal indebtedness from State taxation is principally based upon the consideration of the paramount authority of the Federal Constitution over the Constitutions and laws of the States. The pre-eminence of the former is beyond dispute. It is inherent in the nature of an imperial Government, instituted to watch over and protect the interests and welfare of particular local governments. The powers conferred for such purposes must necessarily be absolute and uncontrollable. All general reasoning upon the subject is, however, rendered unnecessary by the explicit provision referred to in the Constitution itself. But before the State enactments can be called upon to yield to Federal institutions, it must satisfactorily appear that there is a conflict between them. Undoubtedly the Federal Government could enter the money market with greater advantage if it could promise to the lenders an immunity against State taxation in respect to the money to be loaned. But, as no other borrower can offer any such advantage, and as without it loans have always been sought and obtained, and no doubt will continue to be,

the withholding of it cannot be justly considered a restraint upon the borrowing power. What is asked is not in truth the removal of an obstacle, but a positive bounty to the lenders of money to the Government. It is claimed that an advantage should be conceded to them which is rightfully withheld from every other lender. Hence, it appears to us that there is no hostility between the laws of this State, which attempt to tax its citizens, among the mass of their property, for all their money loaned, without any exception of such as may have been lent to the Federal Government, and the power to borrow money which the Constitution has conferred upon that Government. Both provisions can stand perfectly well together, and there is not really any conflict between them.

The power of taxation is as essential to the existence of the State Governments as that of borrowing is to the Nation. Both undeniably exist. The right of the several States to include the public creditors, in respect to the money owing to them by the Nation, among the tax-payers, may be one of great importance. The amount of property existing in that form is now very large, and public measures transpiring at this moment show that it is to be greatly increased. A judgment which should exonerate that mass of wealth from liability to contribute to the expenses of the State Governments, might lead to considerable embarrassment. Besides, it would create a class of favored citizens, who could put the tax-gatherers at defiance, while the mass of the community would be left to defray the whole expense of the State and local administrations. This, it is true, should not prevent the rendering of such a judgment, if the true interpretation of the Constitution requires it. But if it shall appear that the power of the Federal Government to contract loans cannot be materially impaired by holding the public creditor liable to pay his share of the public burdens; while the administration of the fiscal affairs of the States will be seriously embarrassed by withdrawing a large mass of the property of the citizens from liability to taxation, those circumstances (which are now actually transpiring) would seem to call for a reconciling construction which will allow both the great political powers to exist without either being essentially impaired. The necessity of such a

construction of the Federal Constitution was foreseen while the draft of that instrument was under discussion, prior to its ratification by the State Conventions. One of the most indispensable powers conferred upon Congress was that of laying and collecting "taxes, duties, imposts and excises." But as the great bulk of the expenses of public administration was left to be defrayed by the States and their local divisions, the National Government being limited to external relations and a few subjects of internal government, it was essential that the right of taxation should continue to be enjoyed by the States, to enable them to meet these necessary expenses. They were, however, prohibited from laying duties upon imports or exports, or upon tonnage, without the consent of Congress; but as to all other subjects of taxation, embracing the real and personal estates of the citizens, the Constitution was silent as to the rights of the States. A rigid construction of the provision making the Federal laws, enacted pursuant to the Constitution, supreme over those of the States, would forbid the latter from exercising a concurrent right of taxation over subjects as to which the taxing power of Congress should be applied. Suppose, for instance, that the General Government should lay a land tax, could a State Government do the same thing while the Federal law remained in force? True, if the State tax was of moderate amount, the landowner would be able to pay both, and thus no embarrassment would arise to the General Government. But it might be said, if you admit the principle of concurrent taxation by the States, it will not be possible so to limit the amount as to prevent inconvenience in the exercise of the Federal power; and the Federal laws are declared to be paramount to those of the States. Hence, it was apprehended that the taxing power of the States might be held to be taken away by the like power which the Constitution conferred upon Congress. This objection was treated of in the 32d and 33d Letters of Publius, written by Mr. Hamilton. He maintained, by a convincing train of reasoning, that the taxing power of Congress was not, in respect to any subjects, except imposts, exports and tonnage, exclusive of or superior to that of the States, but that they were concurrent. "The necessity," he said, "of a concurrent

jurisdiction in certain cases, results from the division of the sovereign power; and the rule that all authorities, of which the States are not explicitly divested in favor of the Union, remain with them in full vigor, is not only a theoretical consequence of that division, but is clearly admitted by the whole tenor of the instrument which contains the Articles of the proposed Constitution. (Federalist, No. 32.) He insisted that it was not a case of repugnancy in that sense which would be requisite to work an exclusion of the States. While he admitted that it was possible that a State might tax a particular kind of property in a manner which would render it inexpedient that a further tax should be laid on the same subject by the Union, he still held that it would not imply a constitutional inability to lay such further tax. He conceded that the particular policy of the National and State systems might now and then fail to coincide exactly, and that forbearance might be required. "It is not, however," he added, "a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy, that can, by implication, alienate and extinguish a pre-existing right of sovereignty." (Id.) And he concludes, as the result of the whole argument, that the individual States would, under the proposed Constitution, retain an independent and uncontrollable authority to raise revenue to any extent they might stand in need of, by every kind of taxation except duties on imports, exports and tonnage. (Federalist, No. 33.)

The repugnancy between the concurrent powers of taxation residing in the General and in the State Governments, seems equally as striking as that which is alleged to exist between the Federal power of borrowing money and the State power of taxing all the property of the citizen, including his money invested in loans to the Government. It may be said that the latter power can be exerted to an extent which would impair the efficiency of the other. But such an effect, if produced, would be incidental and indirect. State taxation might, it is true, supposing a very extreme case, be carried to such an extent that nothing would be left to lend to the Nation. But if no unfavorable discrimination is made as to money invested in Federal loans, it cannot be alleged that such excessive

taxation would be any more hostile to the borrowing power of the General Government than any other species of State misgovernment; and it can scarcely be pretended that the Federal institutions are supreme in such an absolute sense that any State power which, by a possible abuse, may impair the efficiency of some national attribute, is necessarily abrogated. Indeed, the complaint on the part of those who oppose the claim of the State is, as has been already remarked, not so much that our State tax law conflicts with the Federal power to borrow money, as that it does not concede to the Union superior rights in our money market over those enjoyed by any other class of borrowers.

It remains to notice the judgments of the Supreme Court of the United States which, it is argued, have laid down the principles which lead to the entire exemption of Federal stock from State taxation. In *McCullough vs. The State of Maryland*, 4 Wheat. 116, the question, in substance, was, whether the issues of bank notes by the Maryland branch of the Bank of the United States could be subjected to a stamp tax under the laws of Maryland. That State had passed an act requiring banks transacting their business in that State, but which were not chartered by the State legislature, to issue their notes on stamped paper on which a certain duty was to be paid, but for which any bank might commute by paying a tax of fifteen thousand dollars a year in advance. A heavy penalty was provided against any bank officer who should issue unstamped notes; and the action was brought against McCullough, the cashier of the Baltimore branch of the Bank of the United States, to recover penalties for a violation of the act. The constitutional validity of the act of Congress incorporating the bank, was largely discussed, and was passed upon by the court; and its constitutionality was sustained. The bank was considered a convenient, useful, and essential instrument of the government in the prosecution of its fiscal operations, and its establishment by Congress was held to be the constitutional exercise of the power "to make all laws which should be necessary or proper to carry into execution" the authority granted to the General Government. Then the question as to the power of the States to tax the bank or its branches was con-

sidered and determined. But when it had been once settled that the bank was a constitutional agency and instrument for the transaction of the moneyed operations of the government, it followed necessarily, as it seems to us, that it could no more be taxed by State authority than the treasury department, the mint, the post-office, or the army or navy; and it was upon this ground that the Maryland statute was held to be unconstitutional. The State power of taxation, which was admitted to embrace everything which existed by its own authority, or which was introduced by its permission, was held not to "extend to those *means* which are employed by Congress to carry into execution powers conferred on that body by the people of the United States." (See opinion of Chief Justice Marshall, p. 429.) The same question again arose in *Osborn vs. The United States Bank*, 9 Wheat. 738, which was an action brought to test the validity of a statute of the State of Ohio, by which an annual tax of \$50,000 was imposed upon the Ohio branch of the Bank of the United States, to be collected by means of a warrant to be issued by the auditor of the State. The question was again elaborately argued and considered by the court, and the exemption of the bank and its branches again declared, on the ground that the institution was an instrument, or, as it was several times called in the opinion of the court, a *machine* for carrying on the moneyed operations of the National Government. In the State laws under consideration in both these cases, the branches of the bank were taxed, not in respect to their property, *eo nomine*, as banks, and because they were banks. Perhaps it may be inferred from the reasoning of the court, that they would have been held equally exempt from taxation, if the tax had been laid on the corporation in respect to its capital or personal property. No idea, however, was entertained that the money which was invested in the stock of the bank was thereby withdrawn from State taxation. Indeed, such a conclusion was explicitly disavowed in the opinion of the Chief Justice in the first-mentioned case. "This opinion," he says, "does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid on the real property of the bank, in common with the other real property

within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional:" 4 Wheat. 436.

Enough has been said to show that these cases bear no analogy to the one before us. But, in *Weston vs. The City Council of Charleston*, 2 Pet. 449, anno 1829, the subject of State taxation of the debt of the United States, in the hands of an individual, came directly before the Federal Supreme Court, and the judgment was against the right to lay the tax. The case differs from the present only in the circumstance that the tax was not laid upon the bulk of the property of the citizens, but only upon certain specified securities, and that it was imposed upon the United States stock *eo nomine*. It was imposed by the municipality of the city of Charleston, South Carolina, under authority derived from the legislature of that State. It was laid, as the report states, "upon all personal estate, consisting of bonds, notes, insurance stock, *six and seven per cent. stock of the United States*, or other obligations upon which interest has been or will be received during the year, over and above the interest which has been paid (funded debt of this State, and stock in the incorporated banks of this State and the United States Bank, excepted"); and the amount of the tax was "twenty-five cents upon every hundred dollars." Real estate does not appear to have been embraced. Neither were goods or personal chattels of any kind, or slaves, or the stock of the General Government paying less than six per cent., or simple contract debts due to the tax-payer, or individual obligations on which, for any reason, interest should not be paid within the year; and the public debt of the State, the stock of all the State banks, and that of the Bank of the United States, were in terms excepted. It was not, therefore, a tax upon the property of the tax-payer generally; but particular kinds of property were selected from the mass, embracing, in all probability, far less than a moiety of the private property of the city, and the tax was

assessed upon that, to the exoneration of all the residue. And the tax imposed was not limited to the aggregate of the public charges for the year ; but an arbitrary sum was exacted of twenty-five cents on each hundred dollars, whether that should be more or less than the exigencies of the city government should call for. The different system upon which the taxes of this State are assessed, has been already shown. Under the ordinance of the city of Charleston, the United States would not enter the money market of that city upon an equal footing with all other borrowers. The State of South Carolina, for instance, could assure those who should lend it money that they should be exempt from city taxation, and the same advantage would be extended to capitalists who were minded to invest in the stock of the State banks or in that of the Bank of the United States. So, money or property invested in mercantile, manufacturing or other business, so long as it does not assume the form of interest paying obligations, would be exempt from taxation. The law, or ordinance, discriminated, in respect to taxation, adversely to certain classes of securities, including the scrip of the public debt of the United States. The effect upon the government was nearly the same as though the funded debt of the Union had been singled out as the subject of taxation. Including other securities, the whole constituting only a part of the property of the citizens which might be subjected to taxation, does not relieve the law from the charge of visiting the whole of the public burdens upon particular kinds of property in exoneration of the mass of it. Such a measure might arise either out of motives of hostility to the property charged or the business out of which it originated, or from a motive of hostility to the interests taxed, or a desire to favor the owners of the residue at the expense of such interests. In either case it might easily be carried to the extent of seriously discouraging or entirely destroying the interests discriminated against. But where all the private property of the community is taxed ratably, no such effect could follow, and under such a system, moreover, there is but little danger of oppressive taxation. In levying such a tax, the legislature acts equally upon all its constituents. In our opinion, the judgment last referred to is distinguishable in principle from the case we

are considering, in the point to which we have now referred. If the Federal stock can be taxed separately and specifically at any amount which a State legislature, or a municipality to which its power has been delegated, shall see fit; the government in seeking to obtain money on loan may be effectually driven out of the markets of such State. But such a consequence could never happen under the existing tax law of this State. The idea that the legislature would dare, or would be permitted, by excessive taxation, to destroy or seriously embarrass the interests of all the property holders of the State, is not to be supposed.

Intending as we do to follow implicitly the matured judgments of the Supreme Court of the United States, pronounced in cases arising under the Federal Constitution and Laws, we yet conceive ourselves at liberty to receive or to reject any *dicta* which were not called for by the facts of the case adjudged, according to our own sense of their conformity or want of conformity to law. We are aware that some portion of the reasoning of the opinion of the court, prepared by the venerable Chief Justice in the case referred to, would embrace the present controversy, though other parts of it we think refer to the tax under consideration as laid specifically upon Federal stock; and that in the dissenting opinion of Mr. Justice Thompson, the majority of the court are understood to assume the broad ground that the stock of the United States is not taxable in any shape or manner whatever. But we think it was not legally possible for the court to decide, that such stock could not be taxed along with the mass of the tax-payer's property, under a taxing system like the one prevailing in this State, while determining a controversy in which the actual facts presented by the litigation disclosed, a case of taxation discriminating adversely to such stock. Such a question as is claimed to have been decided, was not discussed by the counsel on the argument. The counsel for the plaintiff in error, who was the party seeking to avoid the tax, did not contend that the stock would be exempt under a system which should embrace all property, or even all public funds. He said. "The ordinance does not impose a tax upon all public funds, but *specifically* on the six and seven per cent. stock of the United

States. Thus, there are selected as the particular objects of taxation, these debts of the Government of the United States." And the counsel laid before the court as a part of their argument the opinion of three of the judges of the Constitutional Court of South Carolina, who, holding that the stock was not taxable, dissented from the opinion of the majority. But they placed their dissent on the ground that the tax was upon the stock, *eo nomine*, and was thus a burden imposed upon the credit of the United States.

We differ, with natural reluctance, from even an *obiter dictum* of so great and wise a judge as Chief Justice Marshall, especially when apparently concurred in by a majority of the judges of the national tribunal of last resort; but we are happy to know that if we have fallen into an error, it can readily be corrected. If that eminent court shall, upon a reconsideration of the question, adjudge that stocks of this description are universally exempt from taxation, we shall cheerfully conform our judgments to such decision; but until such review shall be had, we think it safer to follow the direction of our own convictions. The question is confessedly one of very great importance. If we determine it in favor of the tax-payers, the public authorities cannot appeal to the Federal court, as it is only in the case of a right, claimed under the Constitution or laws of the United States, which has been denied by a State court, that the National tribunal has jurisdiction, whereas the judgment, which we actually render, can be carried immediately to the court of the last resort.

The judgment of the Supreme Court is affirmed.

MASON, J., also delivered an opinion for affirmance; SELDEN, LOTT, JAMES and HOYT, JJ., concurred, without, however, passing upon the questions first discussed, as to the construction of our statutes, as to which four of the judges were understood to express a different opinion from that stated by Judge Denio.

The question raised in this case is for the first time distinctly decided. As an elaborate discussion by a learned and able Court, it furnishes material for the final adjudication of the matter by the Supreme Court of the United States.

The recent case of *Almy vs. State of California*, 24 How. U. S. 169, (1860,) may have some bearing upon the question. A tax upon a *bill of lading* of gold exported, was held to be in reality a tax upon the gold itself. Says the Court in

substance, Ch. J. Taney delivering the opinion, "A bill of lading, or some written instrument of the same import, is necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another. Such instruments are hardly less necessary to the existence of such commerce than casks to cover tobacco, or bagging to cotton, when exported, for no one would put his property in the hands of a ship-master *without taking written evidence of its receipt on board the vessel, and of the purposes for which it is placed in his hands.*" In like manner, it may be urged, that government stocks and securities of the same import are always associated with the borrowing of money. No one would think of lending to the government, without the evidence

of the loan which they furnish, and the convenient means of transfer which they supply. They are the *instruments* of borrowing, as bills of lading are the instruments of commerce. They are not only evidence of the indebtedness of the government to the lender, but they also supply the means by which that indebtedness can be contracted. If this view be correct, the fact that they were taxed by a State in common with other subjects, would not be decisive, for it is conceived that the *instruments* or machinery by which the general government carries on its constitutional operations, cannot be taxed by the States at all. The tax becomes, in substance, an interference with the exercise of the power of borrowing, itself.

T. W. D.

In the Supreme Judicial Court of New Hampshire, August, 1861.

GEORGE W. PINKERTON vs. MANCHESTER AND LAWRENCE RAILROAD.¹

1. Upon a pledge of stock in a railroad corporation in New Hampshire, there should be such delivery as the nature of the thing is capable of, and to be good against a subsequent attaching creditor, the pledgee must be clothed with all the usual muniments and *indicia* of ownership.
2. Under the laws of New Hampshire, a record of the ownership of shares must be kept by such corporations in this State, and by proper certifying officers resident herein.
3. On the transfer of stock the delivery will not be complete, until an entry of such transfer is made upon the stock record, or it be sent to the office for that purpose, and the omission thus to perfect the delivery will be *prima facie*, and if unexplained, conclusive evidence of a secret trust, and therefore as matter of law fraudulent and void as to creditors. Where the transfer was made at a distance from the office, and the old certificates surrendered, and new ones given by a transfer agent appointed for that purpose, and residing in a neighboring State,

¹ We are indebted to the courtesy of Mr. Justice Bellows for the opinion of the Court in this important case at so early a date after its delivery, for which he will be pleased to accept our most sincere thanks.—Eds. AM. L. REG.

proof that the proper evidence of such transfer was sent to the keeper of the stock record to be entered by the earliest mail communication, although not received until an attachment had intervened, would be a sufficient explanation of the want of delivery, and such transfer would be good against the creditor.

4. But where the pledge was made in Boston on the eighth day of July by a delivery over of the certificates, and nothing more done until the third day of the following August, and then the old certificates surrendered to the transfer agent there, and new ones received from him, and notice given by the first mail to the office at Manchester in this State: *It was held*, that as against an attachment made between the obtaining the new certificates and the notice at the office, the possession was not seasonably taken, and the transfer was therefore not valid.
6. Where, upon a sale on execution of shares in a corporation, a certificate is demanded of the corporation by the purchaser, and a suit is brought for refusing to give such certificate, the measure of damages is the value of the stock at the time of the demand, with interest, and not the value at the time of trial or at any intermediate period.

Perley, Clark and Smith, for plaintiff.

W. C. and S. G. Clark, for defendant.

The opinion of the Court was delivered by

BELLOWS, J.—This is an action of assumpsit for refusing on demand, to give to the plaintiff a certificate of twenty-nine shares of the stock of the Manchester and Lawrence Railroad, and to pay him the dividends on the same stock.

It appeared that on the 8th day of July, 1854, one Holbrook owned ninety-six shares of that stock, and then transferred them by indorsement on the back of the certificates to the Granite Bank, Boston, of which he was President, as collateral security for his debts to that bank, amounting to over \$100,000.

The certificates were at the same time delivered to the bank, where they remained without any entry of a transfer on the books of the railroad until the third day of the ensuing August, at a little past 2 o'clock P. M., when they were delivered by Holbrook to Moses J. Mandell, who entered the transfer in a book kept by him as transfer agent, at the office of Brown & Sons, in Boston, of which firm said Mandell was a member, and the certificates were surrendered by the bank to Mandell, and new ones issued by him for the same stock to the bank, he being furnished with blank certificates signed by the President and Treasurer for such pur

poses. And by the earliest conveyance Mandell sent the old certificates, with notice of the transfer, to the office of the railroad at Manchester, which was received there at about eight o'clock in the afternoon of the same third day of August, and afterwards, in September, 1857, a corresponding entry of the transfer was made in the proper books at that office, as of the date of Sept., 1857.

It also appeared that the Treasurer of the railroad corporation, by vote, in June, 1852, was authorized to appoint a transfer agent in Boston, and that on said third day of August, and for some time before, said Mandell was acting as such transfer agent, and was furnished by the corporation with books to be used for that purpose, and with blank certificates signed by the proper officers of the corporation, and to be filled up and used by him in the course of his business as such agent; and it appeared also that what said Mandell did in issuing new certificates and sending notice to the office at Manchester, and entering the transfer on the books kept by him, was in the regular course of his business as such transfer agent, and that the plaintiff was aware of this course of business, and that said Mandell acted as such agent.

It further appeared, that on said third day of August, the plaintiff, a little before noon, went to Mandell's said place of business, to ascertain if Holbrook had transferred his stock, and finding that no transfer had been entered there, he went to Manchester, procured a writ upon a note he held against said Holbrook, and attached his stock in said corporation at eight minutes before five o'clock in the afternoon of said August 3d, and without any knowledge in him or the officer serving the writ, of any assignment of the stock.

That judgment was obtained in that suit, and twenty-nine shares of that stock sold to the plaintiff to satisfy it, on the 12th day of July, 1856; the lien acquired by the original attachment having been preserved, and the question is, whether the assignment to the Granite Bank was good against the attaching creditor.

To the regularity of the proceedings upon the attachment and sale upon execution, there is no exception, nor is there any objection to the existence of a *bond fide* debt to the Granite Bank; but

the only question is, whether the transfer was so far completed as to be valid against an attaching creditor.

There is nothing either in the charter or by-laws of the corporation, to prescribe or regulate the mode of making a transfer, but it is contended by the plaintiff's counsel, that until it is entered or recorded in the stock books of the corporation kept in this State, the transfer is not valid as against an attaching creditor. And the argument is put upon two grounds :

I. That by force of the various statutes upon the subject of the evidence of ownership of stock, and the keeping of the records, and the residence of the officers and their duties, such entry or record is necessary to a valid transfer.

II. That to constitute a complete delivery of the stock, such entry and record are necessary, as the natural and recognised *indicia* of ownership, and that without such entry the stock must be deemed to be still in possession of the assignor, which implies a secret trust, and is, therefore, in the judgment of the law, fraudulent and void as to creditors.

In regard to the second ground taken by the plaintiff's counsel—namely, that without such entry or record the possession of the stock cannot be deemed to have been changed—it is alleged in answer by the counsel for the defendant, that the entry or record in the books of the transfer agency was sufficient, and the same as if entered in the books at Manchester ; and it is also suggested that all the possession was given that the nature of the property was capable of, as in case of that of sale of goods at sea.

And it appears that, by the earliest conveyance after the old certificates were surrendered, the new one was sent to the office at Manchester, with notice of the transfer.

Had this been done immediately upon the pledge and transfer recorded in the books at Manchester, a question might have arisen whether the possession was not protected without unreasonable delay, and so as to prevail against an intervening attachment, as in *Ricker vs. Cross*, 5 N. H. 570, and in the case of the sale of a ship in a distant port, as in *Putnam vs. Dutch*, 8 Mass. 287 ; *Portland Bank vs. Stacy*, 4 Mass. 661 ; or abroad or at sea, as in the cases

cited in *Ricker vs. Cross*, and as in *Cunard vs. Atlantic Ins. Co.*, 1 Peters, 384, 449, and *Jay vs. Sears*, 9 Pick. 4, and *Bufferton et al. vs. Curtis et al.*, 15 Mass. 528, and 1 Smith's Leading Cases, 6, 7.

In this class of cases it may be said that the want of delivery at the time is explained within the principle of *Coburn vs. Pickering*, 3 N. H. 415, upon the ground that such delivery was impossible, and therefore the presumption of fraud is repelled. See *Gardner vs. Howland*, 2 Pick. 599, and *Peters vs. Ballister*, 3 Pick. 495. On this ground a similar doctrine has been held in the case of the sale of a slave too sick to be moved at the moment.

But in the case before us this question does not arise, because the assignment was made on the eighth day of July, and nothing sent to the office until the third day of August, and this we think could not be regarded as using due diligence to perfect the assignment, if such entry and record was necessary. Nor do we think that books of the transfer agent in Boston can be regarded as the records or accounts of the shares or interests of the corporators contemplated by the several statutes, in providing for the means of taxing the several shareholders, enforcing their private liability, or for giving creditors the necessary information to enable them to attach or levy upon the stock. On the contrary, we think it quite clear that the law contemplates the keeping a record of the ownership of the stock in the State, or by an officer resident here, and competent to certify the same. Sect. 9, of ch. 953, Laws of 1850, comp'd St., ch. 150, § 67, provides that the treasurer and clerk of railroad corporations shall reside in this State, except where the railroad is part of one created by the acts of two or more States; and this provision is not affected by the fact that the payment of dividends to stockholders is provided for at the place of business of the corporation in this State. The section provides that the clerk and treasurer shall reside "within this State, and all the books, papers and funds of said corporation, with the foregoing exception—i. e. in case of a road in two States—shall be kept therein, or shall provide for the payment of all dividends to the stockholders in this State, at the place of business of the corporation in this State." This alterna-

tive provision we think is designed as a substitute for the keeping of funds for the payment of dividends, and the books and papers connected therewith, in this State, and is not to be construed to dispense with the necessity of keeping a record or account of the stock in this State, or of the residence here of the clerk or treasurer. By the Revised Statutes, ch. 146, sect. 13, which is prior to the act in question, no person could be eligible to the office of *clerk* of any corporation unless he was an inhabitant of the State, and it is quite clear, from the whole course of the legislation prior to this law of 1850, that the keeping of the records or accounts of the shares or interests of the corporators, by the treasurer, or other officer in this State, has been steadily contemplated by the legislature. This is manifest by the law requiring the clerk of the corporation to return a list of the stockholders to the town clerk, under a penalty of fifty dollars; Comp. St., ch. 147, secs. 8 to 12; the provision for the attachment of stock, by leaving a copy of the writ and return with the clerk, treasurer or cashier; the provision requiring the officer having the care of the records of stock to exhibit, on demand, to the officer making such attachment, a certificate of the number of shares owned by the debtor, and to exhibit to him such records and documents as may be useful to the officer in discharging his duty, and subjecting him to a penalty and damages for neglect. Comp. St., ch. 207, § 16 to 21. So in relation to manufacturing corporations, it is provided, that if the treasurer does not reside within this State, the stock record shall be kept within this State by the Clerk.

With these provisions and this policy in view, it will hardly be contended that the alternative provision in regard to the payment of dividends in this State is to be regarded as a substitute for the residence of the clerk and treasurer, and the keeping of the stock record in this State. For it is quite obvious that such provision for the payment of dividends can, in no aspect of the case, be regarded as a substitute for keeping the stock record here, and in the hands of a certifying officer of the corporation.

To authorize a construction that would make this alternative

provision a substitute for all the rest, would require language much more explicit than we find there. If, then, an entry of the transfer in the books of the corporation be necessary to a valid transfer as against this plaintiff, we hold that it must be done in the books kept in this State. The question then is, whether such entry is necessary.

In this case both the plaintiff and the Granite Bank were creditors of Holbrook, the former owner of the stock, and both claim under him—one by sale on execution, the other by voluntary transfer from the debtor.

By the law of New Hampshire, as it has existed ever since 1812, stock in all corporations is subject to attachment and execution, and the question is, whether the transfer was so far perfected as to be valid against the plaintiff's attachment.

In deciding this question it is not material to determine the precise character of this property, whether such stocks be regarded as *choses in action* or not; because we are satisfied that it comes within the provisions of the statute of 18 Eliz., c. 5, even if regarded as *choses in action*.

The terms used in that statute in respect to personal property, are "*goods and chattels*," but they are construed to embrace things in action as well as in possession. 2 Black. Com. 384, and note, *Ford & Sheldon's case*, 12 Co. Rep., applying to an Act of Parliament. *Ryal et al. vs. Rowles et al.*, 1 Atk. 164, 182; S. C. 1 Ves. 348, 363, 366-7, 369, 371. This case involved the construction of the terms "*goods and chattels*," in the statute of 21 James 1, relating to conveyances by persons afterwards becoming bankrupt, and it was held that they included a conveyance of a share in a trading concern by one of the partners, and it was expressly held that these terms in an Act of Parliament would include *choses in action*.

And such, we think, has been the doctrine of the courts in this State, as shown in cases of foreign attachment and otherwise. *Hutchins vs. Sprague*, 4 N. H. 469; *Giddings vs. Colman et al.*, 12 N. H. 153; *Langley vs. Berry*, 14 N. H. 82. See *Newman vs.*

Bagley & Tr., 16 Pick. 570; and *Richmondville M. Co. vs. Pratt et al.*, 9 Conn. 487.

The claim of the Granite Bank arises from what must be regarded as a pledge, and, to be valid, a delivery is essential at least as against creditors.

To constitute such delivery the assignee should be clothed with the usual marks and indications of ownership.

In the case of things in possession, there should be a manual delivery and change of possession, or its equivalent.

In the case of things in action, the usual muniments of title should be conferred upon the assignee. As to the former, it is held, that if the articles are bulky, the delivery of the key of the warehouse in which they are deposited, will suffice.

Ryal vs. Rowles, 1 Ves. 362. See *Patten vs. Smith*, 5 Conn. 200.

So in case of the sale of goods at sea, a transfer of the bill of lading by indorsement, is, by the commercial law, valid as to creditors.

Caldwell vs. Ball, 1 T. R. 205, 215; *Conard vs. Atlantic Ins. Co.*, 1 Peters, 444, and cases cited; *Lanfear vs. Sumner*, 17 Mass. 112.

A bill of lading is an acknowledgment under the hand of the captain, that he has received the goods and will deliver them to the person named therein, and by the well settled principles of the commercial law is assignable, by indorsement, and this is equivalent to the actual delivery of the goods.

Such transfer is the ordinary and appropriate mode of selling goods at sea; and it was held in *Caldwell vs. Ball*, 1 T. R. 205, 215, that where two bills of lading were signed by the same captain, the person to whom one was first transferred would hold the goods. So where the goods sold are in the custody of another, and an order is given to the depositary to deliver them to the buyer, which is presented to him, there the sale is complete.

Plymouth Bank vs. Bank of Norfolk, 10 Pick. 459; *Tuxworth vs. Moore*, 9 Pick. 348.

In the case of real estate mortgaged, and the title deeds are left with the mortgagor, who makes a second mortgage, and delivers the title deeds, the first will, in equity, be postponed to the second: *Ryal vs. Rowles*, 1 Ves. 360.

In regard to the assignment of choses in action, as a bond or promissory note, a delivery is essential as against a subsequent assignee, or probably a creditor: *Ryal vs. Rowles*, 1 Ves. 348; Bennet, J., p. 362; Parker Baron, 366-7.

As to goods and chattels in possession, a substantial change of possession is, by our law, essential where it can be had. The want of it unexplained, is conclusive evidence of a secret trust, and shows the sale to be fraudulent as to creditors.

In the case of stocks, the natural and appropriate indication of ownership is the entry upon the stock record.

This is indicated by the ordinary course of dealing in such property, and has been assumed in our legislature for many years, and it is manifested in the provisions in regard to returns of stock by the clerks or treasurers for the purposes of taxation; private liability and attachment, all of which assume that the records will show the ownership of the stock; and some of which continue the individual liability so long as the returns, based upon such record, remain unchanged.

In respect to manufacturing corporations, by express provisions a transfer of stock avails nothing against an attachment until entered upon the corporation records. So, too, such record is expressly recognised as essential in the certificates used in the transfer of the stock in question.

Until then, the transfer is recorded, or is entered for record, we think there has been no such change of possession as will prevail against an attaching creditor, unless in cases as before suggested, where due diligence has been used to make such record, and the attachment has intervened.

We are aware that choses in action may be transferred by a simple delivery of the evidence of indebtedness, with an indorsement thereon in certain cases; but it will be observed in these cases, that all such changes in the indications of ownership, as the

nature of the case will admit, is required. If, therefore, upon the transfer of a bond or bill of exchange, it be retained by the assignor, a subsequent purchaser, without notice, would acquire a good title. Indeed, it may be laid down as a general principle governing the transfer of every species of personal property, that to be good against innocent third persons, such transfer must be accompanied with such change of possession and indications of ownership, as the nature of the thing is capable of. Otherwise the seller is enabled, by means of an apparent ownership, to obtain a fictitious credit, and to deceive both creditors and purchasers. To avoid such consequences the law has always watched such conveyances with extreme solicitude.

In this respect we see no distinction between things in action and things in possession, but for anything we can see, the same general rules must apply to both.

It is true that at common law choses in action were not the subject of attachment or execution, except by the custom of London, and then only when the garnishee lived in the city and the debt arose there: Com. Dig., tit. Attachment, A. D. Nor did it extend to stocks in the East India Company. But now by the laws of New Hampshire, of no distant date, choses in action are made the subject of foreign attachment, and stocks in corporations may now be attached specifically like things in possession.

Under the circumstances, and in view of the rapid increase and the vast amount of such property, it becomes extremely material to make a correct application to this species of property, of the principles which regulate the transfer of other kinds of property. In the case before us, the stock was pledged to the Granite Bank on the eighth day of July, 1854, as collateral security for the owner's indebtedness, by a delivery of the certificates indorsed by him to the bank, of which he was then president, and nothing further was done toward taking possession of the stock until the third day of the following August, when the old certificates were surrendered to the transfer agent, and new ones received by the bank.

The act of transfer by Holbrook must be regarded as done on the

eighth of July, and whatever was done afterwards was the act of the bank; and the question is, whether due diligence was used by the bank in taking possession of the stock. It may be assumed, that as the transfer was made at a distance from the place where the stock records were kept, a reasonable time should be allowed to communicate with the officer; but the case finds nothing, and nothing is suggested that could justify a jury in finding that the entry was made in a reasonable time after the act of transfer. There is no suggestion that the communication was made at the earliest convenient opportunity after the transfer on the eighth of July, and if there was a daily mail communication with Manchester there could be no ground to claim that due diligence was used. Nor could the exchange of certificates at the transfer agency be regarded as equivalent to a record, or the entry for that purpose in the office at Manchester. If forwarded by the transfer agent and recorded, it then would be perfected, but we are unable to regard the act of the transfer agent, in respect to the record, as anything more than the act of a mere agent of the bank.

To give to the notice and entry at the transfer agency the effect of a record or entry upon the stock books of the corporation would, as we think, be contrary to the policy of the law, which requires, as the chief evidence of ownership, the record or entry in the books of the corporation kept in this State. Such a rule is simple and easy of application, and is demanded for the convenience of the corporation and the interests of the stockholders and their creditors.

The transfer agent is in no sense the keeper of the stock record, and notice to him is not notice to the keeper of that record. The case, then, is one where due diligence was not used to take possession of the stock; but in respect to the creditors of Holbrook it was for nearly one month left in his possession, he retaining, as before, the usual indications of ownership, such as membership of the corporation, and a right to vote on the stock, his private liability for debts, and his liability to be taxed, being for all purposes the ostensible owner of the stock. Indeed, the retaining these evidences of ownership in the case of an absolute sale of the stock, or any transfer which implies a delivery, would be no less inconsis-

cent, and no less indicative of a trust than the retaining possession of goods capable of manual delivery upon an absolute sale. If there be any substantial difference the inconsistency would be more marked in the case of the stock, inasmuch as in case of goods and chattels which are tangible, it is often convenient to disconnect the use from the ownership for a time; and we are inclined to think that the retention of the possession of goods, which are tangible, would be less likely to mislead creditors and purchasers than the omission to make the proper entry in the stock record on the transfer of stocks. Such a neglect to perfect the transfer of stock as this case discloses, could scarcely fail to excite suspicions as to the existence of a fixed intention to perfect the transfer, at all, at the time it was made. Whatever the fact may be in this case, it is quite apparent that if such transfers are held good as against creditors, it would open a wide field for the mischiefs which are denounced by the statute of 13 Eliz. Especially would it be so in these times, when so large a proportion of all the property of the country is in corporation stocks.

We are brought to the conclusion, that the possession of the stock was not changed, and that no satisfactory explanation for it is given; and that, therefore, there is shown a secret trust, which avoids the transfer as to this plaintiff.

The conclusion we have reached on this point renders it unnecessary to consider the other.

The only question remaining is as to the measure of damages.

The general rule here and elsewhere is, that in an action on a contract to deliver goods, stocks, and other personal property, the measure of damages is the value of the property at the time and place of delivery.

But a distinction has been made in some jurisdictions, by which, where the price has been paid in advance, the plaintiff has been allowed to elect the value at the time when the property ought to have been delivered, or at the time of trial, or, as some cases hold, the value at any intermediate period.

Such a distinction has been recognised in England and in New York, and in the Courts of some other States in the Union, upon

the ground that the seller, having got the money of the plaintiff, the latter may be deprived of the means, by the seller's act, of going into the market and purchasing the same property at the then market prices.

In *Shepard vs. Johnson*, 2 East, 210, it was held, in an action for not replacing stock loaned at the time appointed, it having afterwards risen, that the measure of damages was the value at the time of trial.

This doctrine, and the reason for it, was recognised in *Gunning vs. Wilkinson*, 1 C. & P. 625, which was an action of trover for East India warrants for cotton, which had risen after the conversion. So in *Ganisford vs. Carrol et al.*, 2 B. & C. 624; *McArthur vs. Ld. Seaforth*, 2 Taunt. 257; *Payne vs. Burke*, 2 East, 213; note to *Shepard vs. Johnson*; *Downes vs. Buck*, 1 Starkie Rep. 318, it was held that plaintiff might estimate his damages at the value of the stock at the time of trial. In *Harrison vs. Harrison*, 1 C. & P. 412, on a bond to replace stock, it was held that the value at the time of trial was the measure of damages.

These cases go upon the ground that a judgment for damages, equal to the market value at the time of such judgment, would enable the plaintiff to purchase similar property, and thus operate like a decree for specific performance of the contract.

Mr. Starkie, in his work on Evidence, vol. 3d, 1624, says it down, that the damages may be the value at the time of delivery or the time of trial, "or, as it seems, on any intermediate day;" but he cites against the rule *McArthur vs. Ld. Seaforth*, 2 Taunt. 257.

In 3 Phillips's Evidence, 103, it is said that the plaintiff may elect the value at the time of delivery, or the time of trial, but not, as it seems, upon any intermediate day; and see 1 Saund. on Plead & Evidence, 377 and 677, and Chitty on Contracts 393, note 2, by Perkins.

In *Dutch vs. Warren*, which is stated in *Moses vs. Macfarlan*, 2 Burr. 1010, where there was a contract to deliver stock, the price being paid in advance, held, that the value at the time of the breach was the measure of damages, though less than the sum paid

So on a loan of stock to be replaced at a certain day, held, that the measure of damages was the value on that day. *Saunders, Kentish & Hawkesly*, 8 T. R. 162. In *West vs. Wentworth et al.*, 3 Cowen Rep. 82, it was held, that for the breach of a contract to deliver salt, the price having been paid in advance, the measure of damages was the highest market price between the time the salt was due and the time of trial; and the cases cited to sustain the decision are *Cartelyan vs. Lansing*, 2 Caines' Cas. Err. 216, and *Shepard vs. Johnson*, 2 East, 211, neither of which goes to that extent.

The case of *Clark vs. Pinney*, 7 Cowen, 681, decided by the same Judge, Sutherland, takes the same ground after a review of the English cases, and these decisions have been followed by the Courts of some other States, as in *Bank of Montgomery vs. Reese*, 26 Penn. 143, which was an action against the plaintiff in error for wrongfully refusing to allow the defendant in error to subscribe for and receive certain stock in the bank. The Court fully recognises the rule laid down in *West vs. Wentworth* and *Clark vs. Pinney*, as applicable to stocks, but suggests a different rule in respect to articles which are unlimited in production. The Court hold, however, that it is immaterial whether the stock has been paid for or not, but that the rule is the same in either case, and the Court cites *Cud vs. Rutter*, 1 P. Wms. 570, and note, which holds the same doctrine, as it would seem, where the price was not paid in advance, and citing also *Vaughan vs. Wood*, 1 Mylne & Keen, 403. In *West vs. Pritchard*, 19 Conn. 212, it was held, that plaintiff was entitled to the value at the time of trial, or at the time appointed for the delivery, and that this rule applies to other personal property as well as stocks, although in *Wells vs. Abernethy*, 5 Conn. 227, Hosmer, C. J., had expressed a strong repugnance to the doctrine. *Nandon vs. Barlow*, 4 Texas, 289, and *Calvit vs. McFadden*, 13 Texas, 324, accord with *West vs. Pritchard*, in giving the value at the time of trial. In *Shepard vs. Hampton*, 3 Wheat. 200, is a dictum of Marshall, C. J., to the effect simply, that he should think the value at the time of delivery would not

be the rule where the price was paid in advance, but he does not state what it should be.

On the other hand, the case of *Startup vs. Cortuzzi*, 2 Crompton, Meeson & Roscoe, 165, is in opposition to the dicta in *Gineford vs. Carrol*, and to *Clark vs. Pinney*, and *West vs. Wentworth*. In that case, which was an action for not delivering a cargo of linseed according to a contract of sale, on which the plaintiff had advanced a moiety of the price, Lord Abinger charged the jury that plaintiff was not entitled to damages according to the value at the time of trial, and that it was not like a suit for not replacing stock—and this was sustained, on motion for a new trial, by the whole court—there being no evidence that plaintiff had in fact sustained any special damage. See a statement of this case in *Suydam vs. Jenkins*, 3 Sandf. Sup. Ct. Rep. 641, where Duer, J., reviews the cases, and holds, in opposition to *West vs. Wentworth*, and *Clark vs. Pinney*, that the highest intermediate price ought never to be taken as the rule of damages, either in trover or assumpsit, unless it be shown that the plaintiff *would* (not might) have realized that price had the contract been performed.

This case, commencing page 614, is an elaborate review of the cases, and the court hold that the rule of damages must be the same in trespass, trover, replevin, or assumpsit.

Mr. Chancellor Kent, in 2d Com. 648, 480, note, says he does not regard the distinction as to the rule of damages arising from a payment of the price in advance, or not, as well founded or supported; and he says that the value at the time of the breach is a plain, stable, and just rule; and so it seems is the conclusion in Sedgwick on Damages, after a review of the cases, p. 260 to 280, 277; and see cases cited in 2 Kent's Com. 648 in note. In *Gray vs. Portland Bank*, 3 Mass. 364–390, it was held that the value of the stock at the time of delivery, and not on the day of trial, was the true measure of damages; and the case of *Shepard vs. Johnson*, 2 East, 211, is expressly denied. Sedgwick, J., says this rule has been long established and invariably adhered to in Massachusetts. The same rule was applied in *Kennedy vs. Whitwell*, 4 Pick. 466, which was in trover, and after the defendant

sold the goods for a greater price; but it was held that the value at the time of the conversion was the measure of damages, and so in *Sergeant et al. vs. Franklin Insurance Company*, 8 Pick. 90, it was held that the value of the stock at the time it should have been transferred was the rule, and the court adopt the doctrine of *Gray vs. Portland Bank*, and *Kennedy vs. Whitwell*, and consider this case as standing on the same ground as the conversion of goods; and so is *Henry vs. Manufacturers' and Mechanics' Bank*, 10 Pick. 415, where certificates of stock were withheld. In replevin, the value of the property when it ought to have been restored, is the true measure of damages: *Swift vs. Barns*, 16 Pick. 194-6; in *Smith vs. Dunlop*, 12 Ill. 184, which was much considered, and the English and New York cases examined, the rule in Massachusetts is sustained. In *Hopkins vs. Lee*, 6 Wheat. 106, held that the value of the land when it ought to have been conveyed, which was when it was paid for, was the measure of damages. So in *Cox vs. Henry*, 32 Penn. St. Rep. 18, which was a contract to convey real estate; the price having been paid in advance, it was held that the value at the time it should have been conveyed is the measure of damages. In *Mitchell vs. Gill*, 12 N. H. 390, it was said that the value at the time of the breach is the measure of damages. But this is laid down as a general proposition, and the distinction arising from previous payment is not adverted to, nor do we find such a distinction recognised in any New Hampshire case. See also *Stephens vs. Lyford*, 7 N. H. 360.

There being, then, much conflict in the authorities, the question is to be settled upon principle; and it may be assumed that the plaintiff is entitled to such damages as will be a full indemnity for withholding the stock.

The general rule is, undoubtedly, that he shall have the value of the property at the time of the breach, and this is a plain and just rule and easy of application, and we are unable to yield to the reasons assigned for the exception which has been sanctioned in New York and elsewhere. It is true that in some cases the plaintiff may have been injured to the extent of the value of the

property, at the highest market price, between the breach and the time of trial.

But it is equally true, that in a large number of cases, and perhaps generally, it would not be so. In that large class of cases, where the articles to be delivered entered into the common consumption of the country in the shape of provisions, perishable or otherwise, horses, cattle, raw material, such as wool, cotton, hides, leather, dye stuffs, &c. ; to hold that the plaintiff might elect as the rule of damages in all cases, the highest market price between the time fixed for the delivery and the day of trial, which is often many years after the breach, would, in many cases, be grossly unjust, and give to the plaintiff an amount of damages wholly disproportioned to the injury. For, in most of the cases, had the articles been delivered according to the contract, they would have been sold or consumed within the year, and no probability of reaping any benefit from the future increase of prices. So there may be repeated trials of the same cause by review, new trial, or otherwise ; shall there be a different measure of value at each trial ?

In the case of stocks, in regard to which the rule in England originated, there are, doubtless, cases, and a great many, where they are purchased as a permanent investment, and to be held without regard to fluctuations, and to hold that the damages should be the highest price between the breach and the trial, where there is no reason to suppose that a sale would have been made at that precise time, would also be unjust.

But it may be fairly assumed that a very large proportion of the stocks purchased are purchased to be sold soon ; and to give the purchaser, in case of a failure to deliver such stock, the right to elect their value at any time before trial, which might often be several years, would be giving him not indemnity merely, but a power in many instances of unjust extortion, which no court could contemplate without pain. In view of such results the courts in England and New York have been inclined to shrink from the application of that rule in many cases, and it has been held that it would not be applied where the action was not brought in a reasonable time ;

and this undoubtedly because of the injustice of allowing the plaintiff to take advantage of the fluctuations of many years. But, even if brought in a reasonable time, and what is a reasonable time is not easy to say, there might be often a lapse of many years before a final trial.

In actions of trover, trespass, and replevin, there would be stronger reasons for the application of such distinction than in cases of contract; inasmuch as the plaintiff is not only deprived of the use of his property, and the means to replace it, from the avails, but is so deprived by the tort of the defendant.

If then the rule is just, it should be applied in these actions; the form of the action not being material in this respect—and in jurisdictions where this doctrine is recognised, it has been so applied, as in *Wilson vs. Mathews*, 24 Barb. 295; and *Greening vs. Wilkinson*, 1 C. & P. 625, which was trover for East India warrants for cotton. In *Wilson vs. Mathews*, the highest market price between the breach and the day of trial was held to be the rule. In this State no such rule has been adopted, and it requires no citation of authorities to show that as applied to actions of trespass, trover or replevin, it would find no countenance here.

The same reasons which oppose the right of electing the value at any intermediate day, as the rule of damages apply also to an election between the time of the breach and the time of the trial, and we are disposed to hold the value at the time of the breach, or when the articles ought to have been delivered, as the just and convenient rule.

In accordance with our views is the case of *Wyman vs. American Powder Works*, 8 Cush. 168. In that case the corporation refused to give the plaintiff a certificate of shares to which he was entitled, or to recognise him as owner, but sold them to another. And it was decided that the defendant was liable to the value of the shares at the time of the demand, and interest from that time, and with this decision we are satisfied.

Therefore, after reducing the amount to accord with these views, there should be judgment on the verdict.

The learned judge has discussed the cases so much at length in the foregoing opinion, that little more remains to be said upon the questions involved.

1. The question in regard to what constitutes a delivery of shares in a joint-stock company is liable to arise in so many different forms, that it is difficult to lay down any universal rule upon the subject.

1. The contract, as between the immediate parties, is sufficiently executed, and the title completely passed, as a general thing, by the mere assignment and delivery of the certificate of the shares. Parker, Ch. J., in *Howe vs. Starkweather*, 17 Mass. R. 244; *Sargent vs. Franklin Ins. Co.*, 8 Pick. R. 98; *Wilson vs. Little*, 2 Comst. R. 448. And this may be effected generally by a blank indorsement upon the certificate of shares, which the holder may fill up at his convenience. *Kortright vs. Buffalo Com. Bank*, 20 Wendell, 91; *Angell & Ames on Corp.* § 564.

But where the charter of the company, or the general laws of the State, contain any specific restriction or requirement in regard to such transfer, it must be complied with, or the title does not pass. *Fisher vs. The Essex Bank*, 5 Gray, 373; *Sabin vs. Bank of Woodstock*, 21 Vt. R. 362; *Pittsburgh and Connellsville Railway vs. Clarke*, 29 Penn. St. R. 146.

2. But, in most of the States, this mere delivery and transfer of the certificate of shares will not be regarded as sufficient notice of the transfer, as to creditors and subsequent purchasers, who have bona fide acquired title in ignorance of the former transfer. For that purpose some notice given at the place where inquiries in regard to the title of the shares would most likely be made, seems to be required. This is the more common mode of effecting the delivery of choses in action.

Thus, notice to the trustees of equitable property, by the rules of equity jurisprudence, as administered in the English courts, gives a priority over an earlier assignment without such notice: 1 Story Eq. Ju., § 421 b; *Foster vs. Blackstone*, 1 My. & Keen, 297; *Timson vs. Ramsbottom*, 2 Keen R. 85. In *Dearle vs. Hall*, 3 Russ. R. 1, Lord Lyndhurst said: "In cases like the present, the act of giving the trustee notice is, in a certain degree, taking possession of the fund; it is going as far towards equitable possession as it is possible to go; for, after notice given, the trustee of a fund becomes a trustee for the assignee who has given him notice." A different rule prevails in the State of New York; but it is not regarded as resting upon any satisfactory foundation: 1 Story Eq. Ju. § 421 c, and cases cited.

3. It is upon this ground mainly, we apprehend, that notice is required to be given of the transfer of shares in joint-stock companies at the office where the principal records of title in the capital stock is kept; since the company itself being a mere trustee of the capital stock for the shareholders, notice to them will perfect the delivery of the equitable title to the shares; and being a trust, which is always a mere equity, it is not susceptible of any other than an equitable delivery. *Sturges vs. Knapp*, 31 Vt. R. 1, 58. All corporate action, as well that of the directors and agents as of the corporation itself, is but a succession of trusts, in regard to which the creditors of the corporation, in the order of their priority, are the primary, and the shareholders the ultimate *cestuis que trust*. *Ib.*

4. If, then, notice is to be given the trustee, in order to perfect the transfer as against creditors and subsequent purchasers, it must be done at the place where such notice is usually received and registered; and it should be in a

form to gain credit, and to enable the company to preserve it in their usual mode of preserving such facts, and that is by entry upon their books of transfer, which would bring us to the same result arrived at in the principal case: 1 Story Eq. Jur., § 400 b, and cases cited. This subject of the requisite notice of the transfer of equitable rights and of choses in action, as well as of the delivery of chattels in the keeping of third parties, is considered in the late case of *Rice vs. Curtis*, 32 Vt. R. 460. The rule in Vermont requires more to be done in the case of personal chattels in the possession of third parties, in order to effect a delivery, than in most other States. It requires that the keeper should consent to become the bailee of the purchaser: while, in other States, the notice makes him such bailee, and if, after that, he treat the former owner as still entitled to control the property, he will make himself responsible to the purchaser. *Chitty on Cont.* 406, et seq. Cases cited above.

II. In regard to the rule of damages adopted by the Court in this case, there can be no question as applicable to the ordinary case of the refusal to deliver articles readily obtainable in the market. The English courts have attempted to make the case of shares in joint stock companies, and some others, exceptions, and to give such damages as will more completely indemnify the owner for the loss of the article.

1. Equity will decree specific performance of a contract to deliver shares in a joint stock company, since they may not always be attainable in the market. *Duncuft vs. Abrecht*, 12 Simons R. 189; *Shaw vs. Fisher*, 5 De G. M. & G. 596; 1 Story Eq. Jur., §§ 724, 724 a; *Taylor vs. Great Indian Peninsular Railway*, 4 De Gex & Jones, 559; S. C. 5 Jur. N. S.

1087. But will not grant such decree for the specific performance of contracts for the delivery of public stock in the national funds, which may always be obtained for the market price. *Redfield on Railw.*, § 38, pl. 2, and cases cited in notes.

2. The more usual remedy against the corporation for refusing to allow the transfer of their shares into the name of one who turns out upon the trial to have been the real owner, and entitled to have the shares stand in his name, is by bill in equity. In *Davis vs. The Bank of England*, 2 Bing. R. 898, where the owner of shares in the defendant's company brought an action to recover the value of them and of the dividends declared upon them, on the ground that the bank had refused to recognise him as the owner, and had suffered them to be transferred into the names of third parties, by virtue of forged powers of attorney, the court said, "We cannot do justice to this plaintiff unless we hold that the stocks are still his," and therefore denied the action for the value of the stocks, but allowed the party to recover the dividends which had been declared and not paid. See also *Taylor vs. Great Indian Peninsular Railway*, supra.

3. But if the recovery of damages is to be made the equivalent of such stock, as in many cases it is obvious it must be, there seems no other rule so satisfactory as the one here adopted. The idea of giving one the advantage of the rise of the market as long as the action remains undetermined, is certainly a most fanciful conceit, and could only have arisen from regarding the defendant as wholly in the wrong, and thus entitled to demand no favor at the hands of the Court. This may do well enough in cases where the party has acted wantonly or in bad faith; but, in the wa-

jority of cases, the defendant may well be presumed to have acted in the same good faith as the plaintiff; and if so, there is no reason why he should be mulct in an amount of damages altogether beyond what it is made reasonably certain the other party has suffered

by his default. The same view of the general rule of damages is taken in the late case of *Hill vs. Smith et al.*, 32 Vt. R. 438, and there can be no question it is destined to prevail in all the courts of this country.

I. F. R.

In the Circuit Court of the United States for the Western District of Pennsylvania.

CONSTANT vs. THE ALLEGHENY INSURANCE COMPANY.¹

1. Though by the Charter of an Insurance Company it is provided that "every contract, bargain, and other agreement," in execution of the powers of the company, "shall be in writing or print, under the corporate seal, and signed by the President, or, in his absence or inability to serve, by the Vice-President or other officer, &c., and duly attested by the Secretary or other officer, &c.," a parol agreement as to the terms on which a policy shall be issued, made by the President, Secretary, or other general agent of the company, may, nevertheless, be enforced specifically in a court of equity, which, in case of a previous loss, will be by a decree for the amount which would be due upon a policy duly executed; GRIER, J.
- 2 But a mere collateral agreement, which does not involve the execution of a policy of insurance, is not within the scope of the general authority of an officer or agent of such a corporation, and cannot be enforced.
3. The plaintiff, through a broker, applied to the defendants for an insurance on a boat for a definite amount, and was informed that "it would be taken." The defendants subsequently sent to the broker their own policy for a part, and the policies of three other companies for the residue, executed by an agent for the latter companies. The broker, on receiving the policies, wrote, in the absence of his principals, to the defendants, to say that he doubted whether the agency policies would be accepted, alleging, as a reason, that the particular agent had not a good reputation for "*settling losses*," and added, "*I don't know whether it is your custom to guarantee the offices you insure in, or not; if you do, I may prevail on*" the plaintiff "to hold the policies." The Secretary of the defendants in reply, wrote: "In handing the policies" to the plaintiff, "you can say that if the boat is not insured in *offices satisfactory* to him, we will have them cancelled; but, *though they are not re-insurances*, yet in case of loss we will *feel ourselves bound for a satisfactory adjustment*. We deem the companies good, and if any parties can settle with them, we can." On the faith of this letter the plaintiff closed

¹ From the MSS. of S Wallace, Jr.

the transaction. One of the substituted companies afterwards became insolvent, and, a loss having occurred, a special action on the case was brought against the defendant: *Held*, (1.) That the Secretary of the defendants had no general authority to bind them by a guaranty of the solvency of the substituted companies; and, (2.) If he had, his letter did not amount to this, but only to an undertaking for a satisfactory determination of the amount of the loss, and its apportionment between the insurers.

Constant and others, including the captain of it, Bowman, were owners of a steamboat, upon which they were about to make an insurance. One Springer was a correspondent of the Allegheny Insurance Company of Pittsburg, the defendant in the case, and in the habit of getting customers for it, which he had authority to do, but he had no authority to make contracts for the Company. Captain Bowman, for himself and in behalf of the other owners, applied to Springer, as agent of the Allegheny Company, to get an insurance of \$20,000 on the boat. Springer communicated with the Company by telegraph, to know if *they* would take the risk, and received for answer "*that it would be taken*;" and Springer so informed Bowman, who requested Springer to write to defendants to take the risk. Springer did so, informing them of the names of the owners, and their respective interests. The defendants agreed to take the risk, and sent to Springer five policies of insurance, covering the risk of \$20,000; two of them of \$2500 each, in favor of Captain Bowman, executed *by themselves*; one for \$5000, in favor of Bowman, executed by the "*Pennsylvania Insurance Company*;" one for \$5000, in favor of plaintiff, executed by the "*Quaker City Insurance Company*;" and the other for \$5000, executed by the "*Commonwealth Insurance Company*," in favor of the remaining owner, one McGhee.

When these five policies were received the owners and the boat were absent on their voyage, and Springer wrote to the Secretary of the Allegheny Insurance Company as follows:

"Your favor, together with the policies on the steamer, came to hand. I was very much disappointed in receiving the three policies from agencies. Altogether I am very much afraid, when the boat comes back, that the owners will not have them. They expected them to be taken in Pittsburg offices, and they were issued

by Mr. Carrier, whose reputation for *settling losses* is not very good in this city. As far as my own knowledge goes, he never *settles without a law-suit*. I don't know whether it is your custom to guarantee the offices you insure in, or not; if you do, I may prevail on them to hold the policies. I will keep the policies until they return, and do the best I can to get them to keep them; but I know the owners are very much prejudiced against the 'Commonwealth' and 'Quaker City' (they have agencies here), and if they will not keep them, I can only return them. I can say no more until the boat returns."

To this letter the Secretary of the Company defendant replied, as follows:

"In handing the policies to the owners of the boat, you can say, that if she is not insured in offices satisfactory to them, we will have them cancelled; but though they are not reinsurances, yet in case of loss we will feel ourselves *bound for a satisfactory adjustment*. We deem the companies good, and if any parties can *settle with them, we can*."

When Springer presented the policy of insurance executed by the Quaker City Insurance Company to the plaintiff, he objected to it. Springer then informed him of the contents of the letter aforesaid, upon which the plaintiff "gave his premium note for \$750, and the matter was closed."

It may be pertinent to observe, that by legislative enactment insurance companies in Pennsylvania, except in cases of special charters, are "empowered to make, execute and perfect such contracts, bargains, agreements, policies, and other instruments as shall or may be necessary, and as the nature of the case may require, and every such contract, bargain, policy, and other agreement shall be in writing or print, under the corporate seal, and signed by the President, or in his inability by the Vice-President," &c., and that subject to this act the Allegheny Insurance Company, the present defendant, held its charter.¹

Soon after the insurance effected by the correspondence and acts

¹ Act of 2d April, 1856, § 10, and Act of 29th January, 1859, P. L., p. 10.

already mentioned, the steamboat was lost; and the *Quaker City* Company having become wholly insolvent, this suit, a special action on the case, was instituted at law, to recover the amount from the defendant, the *Allegheny* Company.

The facts as above stated, were found on a special verdict; judgment being to be entered for \$5265.83, if the Court thought that they made out a case for the plaintiff. otherwise for the defendant.

The opinion of the Court was delivered by

GRIER, J.—To entitle the plaintiff to judgment on this verdict, he must show,

1st. That on the facts as found the Secretary of the Insurance Company could legally bind the Company to guarantee an insurance made by another Insurance Company.

2d. That such a promise or agreement was made, in such form as to support an action at law against the corporation.

By its act of incorporation this Company could make insurance which would be legally valid only by a policy attested by the President, Secretary, and the seal of the corporation. Yet, before such instruments are attested in due form, the President or Secretary, or whoever else may act as a general agent of the Company, may make agreements, and even parol promises, as to the terms on which a policy shall be issued, so that a Court of Equity will compel the Company to execute the contract specifically;¹ and where the loss has happened, to avoid circuity of action the Chancellor will enter a decree directly for the amount of the insurance for which the Company ought to have delivered their policy, properly attested.

The Secretary of the Company, in this case, replied by telegram to one sent by Springer, who acted as a broker or mutual agent of the parties, not that the defendants would themselves take the whole risk of \$20,000, but "that it should be taken." The Company showed their construction of their undertaking by transmitting policies to the amount requested, equally divided among four insurance companies, as negotiated by defendants, and divided

¹ See *Com. Ins. Co. vs. Union Mutual*, 19th Howard, U. S. Reports, 818

among the three several owners of the boat, according to their respective interests. The objection made by the insured was not to the manner in which the risk was divided, but that the agent of one of the companies (the Quaker City) had the character of being a very troublesome person to deal with in case of a loss which would require adjustment.

Assuming the representation of the Secretary, that in case of loss "we will feel ourselves bound for a satisfactory adjustment," is an agreement to guarantee the solvency of the Quaker City Insurance Company, had the Secretary authority to make a simple or parol contract to bind his principal to guarantee the solvency of another company? We think he had not. Every promise to make a policy of insurance under the seal of the Company, and the terms on which it will be done, falls necessarily within the scope of the authority confided to such agent; but any other merely collateral promise or representation, which does not involve the execution of a policy of insurance, is not within the scope of his authority, as agent, because it is not strictly within the scope of the powers granted to the corporation.

Whether the officers of the corporation could, by covenant, duly executed, but not in the form of a policy of insurance, bind the Company to perform such a contract, we need not inquire. This is a suit at law, and the plaintiff must show a legal obligation, executed according to the forms required by the law, which confers the corporate powers on the defendant. And if it were a bill in equity, the Chancellor would decree only a specific execution, to wit, the delivery of an instrument of writing, executed and attested according to law, and such as was within the powers of the corporation as provided by their charter.

But assuming that this parol promise, as stated in the Secretary's letter, would support a suit at law against the Company, is there a promise to guarantee the solvency of the Quaker City, or any of the three other companies who joined in taking this risk of \$20,000? The parties did not complain that the defendants would not take the whole risk on themselves, but had it negotiated and divided among other companies. The objection was not made to the

solvency of any of the companies, but on the anticipated difficulties of *adjustment* in case of a loss occurring. The undertaking of the Secretary is not that the defendant shall pay the amount of the loss, but to take the trouble of *adjusting* the loss with this captain's agent. This might be an easy matter for the defendants' officers to perform, as the very same adjustment would have to be made with and for themselves, and other companies who were not infested by such an agent.

The adjustment of a loss is defined to be the "settling and ascertaining of the indemnity which the assured, after all allowances and deductions made, is entitled to receive under the policy, and fixing the portion which each underwriter is liable to pay."

Now, the direction of the Secretary to Springer is to tender the policies, and if they are not satisfactory to the owners, to cancel them; stating that they are not re-insurances, and that "we feel ourselves bound not to pay the losses if the other insurers should be insolvent," but "for a satisfactory *adjustment*," and adding, "we deem the companies good, and if any parties can settle with them, we can." Here is no guarantee. The whole length and breadth of this undertaking is a satisfactory *adjustment* of the loss, and no more.

The facts as found by the jury, do not, therefore, support the claim alleged in the declaration. The defendants are consequently entitled to judgment on the special verdict.

Judgment for the defendant.

The preliminary question presented in the foregoing case, as to the effect of a parol insurance, is of considerable interest and importance, and though it may be considered as to a great degree settled in this country by the authorities which will be presently cited, a few observations on the grounds on which the principal decisions have been rested, may not be altogether superfluous.

While it is difficult to say at what precise time the practice of insurance was introduced or became general in Europe,

it is certain that for a considerable period neither express regulation nor usage made any particular form essential to its validity, and that the contract was often left in parol: the assured, says Cleirao, trusting to the good faith and honesty of the other party. "But," he adds, "the abuses and disputes which resulted from this mode of dealing, caused its abolition and it has even been subsequently provided that the contract shall be made either in the presence of a notary, or by the intervention

of a register of policies of insurance." Valin, Comm. sur l'Ord. de la Mar., liv. iii., tit. vi. § 2; 3 Boulay Paty, 244. The change, which required the contract to be in writing, is said to have been first effected by an ordinance of the Magistrates of Barcelona, in the year 1484, and has since been followed by all the principal commercial codes of the continent. Whether such provisions concern the substance, or merely the evidence of the contract, has been a matter of considerable discussion. Under those contained in the former *Ordonnance de la Marine*, and in the present *Code de Commerce*, art. 332, which direct simply that the contract "shall be drawn up in writing," it has been considered that this does not make a verbal contract void in itself, but simply precludes its proof by oral testimony, leaving it still possible to establish it by the written admissions of the parties, or by reference to the *serment decisoire*, that is, the examination of the defendant under oath; Pothier, No. 99; Valin, ut supr.; 8 Boulay Paty, 247 (tit. x. sect. 1.); 8 Pardessus Cours de Droit Com. § 972; though, see Emerigon of Insurance (by Meredith) p. 25. Indeed, by the very terms of the *Code*, the contract may be by any private writing under the hand of the party, containing all its essential terms.

These citations are made because it seems to have been sometimes supposed that by the general commercial law of the continent, a contract of insurance must necessarily be contained in some such formal written document as that which we now designate as a "policy," whereas it is a mere matter of municipal regulation, varying in different countries. There can be no doubt that at common law a verbal contract of this character was valid; and it is so now in England, except so far as it is affected by the Statute of Frauds, or the Stamp

Act. In this country, particularly in the large commercial towns, a great deal of the business of insurance is done upon parol agreements, and even the subsequent issue of a policy is often dispensed with. The sudden exigencies of commerce, and the use of local agencies make this sometimes a matter of necessity. Therefore, though the question as to the validity of such agreements has been raised at times with apparent earnestness, they have been generally sustained by the courts. The proper course is to proceed in equity for a specific performance of the agreement by the issue of a policy in due form, and where a loss has actually occurred, a decree may be entered at once for the amount: *McCullough vs. Eagle Ins. Co.*, 1 Pick. 280; *Hamilton vs. Lycoming Ins. Co.*, 5 Barr, 342; *Delaware Ins. Co. vs. Hogan*, 2 Wash. C. C. 4; *Perkins vs. Washington Ins. Co.*, 4 Cow. 645; *Taylor vs. Merchants' Fire Ins. Co.*, 9 How. 465; *Commercial Mut. Marine Ins. Co. vs. Union Mut. Ins. Co.*, 19 How. 318; 2 Curtis, 524; *Trustees of First Bapt. Church vs. Brooklyn Fire Ins. Co.*, 19 N. Y. 805; 18 Barb. 69; *Palm vs. Medina Fire Ins. Co.*, 20 Ohio, 529; *Mobile Dock, &c., Co. vs. McMillan*, 31 Alab. 711. And in some cases it has been held that an action at law would lie: *McCullough vs. Eagle Ins. Co.*, *Hamilton vs. Lycoming Insurance Co.*, *Mobile Marine Dock, &c., Co. vs. McMillan*, ut *supra*. After a loss, the damages in such an action would probably be the same as if a policy had in fact issued; but, in general, the remedy in equity is the most efficient. So where, after an agreement, a policy has been executed, but is withheld from the insured, trover will lie: *Kohne vs. Ins. Co. of North America*, 2 Wash. C. C. 98; see *Watson vs. McLean, Ellis, Bl. and Ell*, 73, and note.

But this is not all; it has further been

held, as in the foregoing case, not to be material that, by the charter of the Insurance Company, or by a general law, policies and other contracts of insurance are to be under seal, signed and countersigned by particular officers. *Comm. Mutual Marine Insurance Co. vs. Union Mutual Insurance Co.*, ut sup. ; *McCullough vs. Eagle Insurance Co.*, ut sup. ; *New York Insurance Co. vs. De Wolf*, 8 Pick. 63 ; *Trustees, &c. vs. Brooklyn Fire Insurance Co.*, ut sup. ; see *Myers vs. Keystone Insurance Co.*, 27 Penn. St. 270 ; but see *Cockerill vs. Cincinnati Mutual Insurance Co.*, 16 Ohio, 148, which, however, seems overruled by *Palm vs. Medina Insurance Co.*, 20 Ohio, 629, so far, at least, as the remedy in equity is concerned. The reasons usually assigned are, that the particular modes of contracting pointed out in the statute do not necessarily exclude others, and that the agreement in such case amounts not to an insurance itself, but to a contract to execute a policy in the required form. Still it must be confessed that the distinction, however ingenious, is not altogether satisfactory. The Legislature could hardly have meant to insist on certain formalities in the execution of a policy, and yet to permit so simple a mode of evasion, as the substitution of an informal but binding agreement in place of the regular contract. Perhaps the difficulty may be somewhat removed by considering the payment of the premium, and the delivery of the usual receipt or memorandum, as analogous to part performance under the Statute of Frauds. The relief being on this hypothesis exclusively in equity, and therefore subject to the discretion of the Court under the whole circumstances of the case, many of the dangers which the Legislature may be supposed to have in-

tended to guard against will be precluded. A further advantage which this view presents is, that the insurance is thereby made to relate to the time when the agreement was actually concluded,—whereas, if the latter is to be considered merely as a *contract for the execution* of a policy, it raises several difficult questions as to whether a reasonable time is to be allowed for the execution, whether a demand must be made by the insured, or whether a non-compliance by him, with some collateral or unimportant regulation, would justify a refusal or delay to execute, all of which might affect or postpone the time of the actual commencement of the risk.

Be this as it may, there are obvious reasons why the doctrine of these last-mentioned decisions should not be extended too far. Experience has shown that the most fertile sources of litigation in insurance cases are, first, disputes as to the declarations and representations of the parties, and, second, disputes as to the authority of agents or officers of insurance companies. It is wise legislation which seeks to mitigate these evils by requiring as far as possible, consistently with the exigencies of business of which we have spoken, that the terms of the contract shall be put in writing, and evidenced, on the part of the corporation, by the signatures of officers as to whose powers there can be no question. Perhaps we may be justified, by these considerations, in confining the class of cases to which we refer, to those which are strictly within the scope of the ordinary business of the Company, and where also, from the necessity of the case, the preliminaries of the contract must be settled in an informal manner.

H. W.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF MASSACHUSETTS.¹

Marine Insurance—Freight in Advance—Recovery for.—The owner of a cargo, who has paid the freight in advance to the owners of the vessel, cannot recover on a policy of insurance by which prepaid freight is insured: *Minturn vs. Warren Insurance Company*.

Criminal Law—Larceny—Principal and Accessary.—One who, in pursuance of a preconcerted plan, devised by himself, remains below stairs in his own house, while his confederate above secretly and by night takes the pantaloons and money of a lodger there, and brings them down stairs, and there delivers the money to him, and he receives the same, is liable for the larceny as a principal: *Commonwealth vs. Lucas*.

Landlord and Tenant—Liability of Administrator of Lessee for Rent.—An administrator of a lessee, who does not quit and surrender the demised premises immediately after his appointment, or upon a notice to quit, until a judgment for the possession thereof has been obtained against him, but keeps the property of his intestate there for several weeks, and sells it by auction upon the premises, and claims of an under-tenant of a portion of the premises, rent which accrued after his intestate's death, must be held to have entered and taken possession of the premises, and is personally liable to the lessor for rent thereof, until his estate therein was terminated by the notice to quit, to the extent of the real value of the use of the premises: *Inches vs. Dickinson*.

Way—Location of Undefined—Loss by Non-user.—The practical adoption and use, for a long time, of a particular route, under a right of way granted by deed, without fixed and defined limits, if acquiesced in by the grantor, operate to determine the location of the way as effectually as if the same had been described in the deed: *Bannon vs. Angier*.

Proof of mere non-user of a way created by deed, for a period less than twenty years, without proof of adverse enjoyment by the owner of the land, is not sufficient proof of an abandonment of the right: *Id.*

Way—Right of Action of Tenant at Will for obstruction of.—A tenant at will of land may sustain an action for an interruption of a passage way appurtenant to the land occupied by him: *Foley vs. Wyeth, Executrix*

¹ The following abstracts have been furnished by Charles Allen, Esq., the State Reporter.

Negligence—Injury to Adjoining Land by Excavation—Right of Tenant at Will to sue for.—If the owner of land makes an excavation in it so near to the adjoining land of another proprietor that the soil of the latter breaks away, he is responsible for all the injury thereby occasioned to the land, and also for the disturbance of a right of way over the land, without proof of carelessness, negligence, or want of skill in making the excavation, but not for injury to buildings which have been placed upon the land: *Foley vs. Wyeth*.

One who is in the occupation of land, which he has agreed to purchase by a written contract which contains no stipulation that he may have possession until the price is paid, is a mere tenant at will, and cannot sustain an action for an injury to the reversion, although he subsequently becomes the owner of the land in fee: *Id*.

In an action for an injury to the plaintiff's land, resulting from an excavation made by the defendant upon his adjoining land, by means of which the plaintiff's soil has broken away and fallen, it is no defence that the injury would not have occurred but for the acts of persons other than the plaintiff, in erecting buildings upon their own land: *Id*.

Marine Insurance—Sale of Vessel at Port of Distress—Actual or Constructive Total Loss, Evidence of—Wrongful Sale by Consul.—No constructive total loss can be claimed by reason of a sale of a vessel at a port of distress, unless the sale is made by the master, if he is present and in charge of the vessel: *Paddock vs. Com. Ins. Co*.

No recovery can be had for an actual total loss occasioned by a storm by which a vessel and her outfits are destroyed in a port of distress into which she has put, and where, before the occurrence of the storm, she has been surveyed, condemned, and sold, under the direction of the consul of the United States, and her cargo transhipped, and her master has given up all attempt to prosecute the voyage in her: *Id*.

The wrongful seizure and sale of a cargo by a consul of the United States, is not a loss under a clause in a policy which insures against the acts of pirates and assailing thieves: *Id*.

In an action on a policy of insurance, the evidence proved that a sea-worthy whaling vessel encountered a gale and sprung a leak, which made it necessary to take in sail and put all hands to the pumps, and throw the try-works overboard, in order to lighten her; that the leak was stopped to such an extent that the vessel did not leak except when sail was carried on the foremast, or, even in that case, so as to require more than one

hour in four at the pumps to free her; that the master was of opinion that the leak did not render her unseaworthy and unable to continue the voyage without putting into a port of distress, but was forced by the crew to do so, for reasons which were not distinctly shown; that, while in the port of distress, against his protest, the vessel was surveyed and condemned, but the survey was not put in evidence, although called for by the defendants, and the reasons for the condemnation were not fully disclosed: *Held*, that these facts were insufficient to allow the insured to claim for a constructive total loss of the vessel and outfits, by reason of a necessary sale at a port of distress, from perils of the sea; or, of the catchings which had replaced the outfits consumed, and which had been transhipped, in port, into a vessel, which was afterwards wrecked: *Id*.

Mutual Insurance—Neglect to pay Assessment where it avails Policy—Mailing Notice sufficient.—A policy of insurance issued by a mutual insurance company, under the conditions and limitations expressed in the by-laws thereto annexed, one of which provides that the policy shall become void, "if the assured shall neglect, for the term of thirty days, to pay his premium note, or any assessment thereon, when requested to do so, by mail or otherwise," is rendered void by the neglect of the assured to pay the amount of an assessment upon his premium note, for thirty days after a written request for payment, prepaid, duly directed, and deposited by the company in the post-office, in due course of mail would reach the place of his residence, as set forth in the policy, whether he received such request or not: *Lothrop & Others vs. Greenfield Stock and Mutual Fire Insurance Company*.

NEW YORK COURT OF APPEALS.¹

Banker—Deposit of Notes and Bills by Customer, how far Changes Property.—The property in notes or bills transmitted to a banker by his customer to be credited the latter, vests in the banker only when he has become absolutely responsible for the amount to the depositor: *Scott vs. The Ocean Bank*.

Such an obligation, previous to the collection of the bill, can only be established by a contract to be expressly proved or inferred from an unequivocal course of dealing: *Id*.

It is not enough to warrant such an inference that the customer was a large depositor of money and bills, and constantly drawing drafts against

¹ From E. P. Smith, Esq., Reporter of the Court.

his remittances, under an arrangement by which he was allowed interest on his average balances; and that after the banker had transferred a bill remitted to him, after acceptance but before payment failed, and suspended business at the place where the remittance was received, the customer continued to draw upon him as before at an office in another State, where the banker did not suspend business: *Id.*

These facts create the relation of debtor and creditor in respect to money received by the banker, but are insufficient to charge him with responsibility for a bill previous to payment, and consequently to vest him or his assignee for a precedent debt, with the property in such bill: *Id.*

Marriage and Legitimacy—Presumption of Intercourse and Counter-Evidence.—The presumption that an intercourse, illicit in its origin, continued to be of that character, may be repelled by a contrary presumption in favor of marriage, and of the legitimacy of offspring, although the circumstances fail to show when or how the change from concubinage to matrimony took place: *Caujolle vs. Ferrie.*

Thus, in support of the legitimacy of a child, the facts that the father desired to marry the mother, and that, although he might have maintained a meretricious intercourse without opposition from his family, he abandoned his home and parents to live with her, are some evidence that he did contract a marriage in fact, prior to the birth of his child: *Id.*

The presumption is not overcome by the fact that, having declared and caused to be recorded his purpose to solemnize the marriage by the public acts prescribed by the municipal law of his domicil, such purpose was not shown to have been consummated, and there was an entry upon the record of such declaration importing that nothing came of it: *Id.*

Nor is it repelled by the omission in the record of the child's baptism, which took place on the day of its birth, of a statement of its legitimacy, though the usage of the time and place appeared to have been to designate as legitimate in similar documents, contracts, &c., those who were in fact such, and the father, mother, and other relatives were thus designated in the contemporaneous writings to which they were parties: *Id.*

The presumption of legitimacy, supported by some facts, sustained against many other circumstances tending to an opposite conclusion: *e. g.*, a reputation at the time of the child's birth that the parents were not married; a separation of the parents very shortly after the birth, and no correspondence between them for the remaining years of the father's life;

the abandonment of the child by both parents for twelve years; the use by the mother of her maiden name, and the designation by her of the child as her nephew: *Id.*

Perjury—Witness Indictable for, though Incompetent—Husband and Wife, Admissibility of, as Witness in Suits inter sese—Not to prove Non-Intercourse, but aliter, after Divorce.—A witness who testifies falsely as to a material fact, is guilty of perjury though he was not a competent witness in the case, and was especially inadmissible to prove the particular fact to which he testified: *Chamberlain vs. The People.*

So held, where, in an action for divorce, the husband—his wife having borne a child—testified that he had no sexual intercourse with her during marriage: *Id.*

It seems (per James, J.), that, in an action between husband and wife, either party is, since the amendment to the code in 1857, a competent witness against the other, in general, though inadmissible to prove the particular fact of non-intercourse: *Id.*

Upon an indictment of the husband for perjury, after divorce, the wife is a competent witness to prove that she has had no sexual intercourse with any other person: *Id.*

Vendor and Vendee—Conveyance Bounding on a Street.—As between grantor and grantee the conveyance of a lot bounded upon a street in a city, carries the land to the centre of the street. There is no distinction in this respect between the streets of a city and country highways: *Bissell vs. The N. Y. Cent. R. R. Com.*

So held, where the conveyance contained no reference to the street, by name, but the lot was described by its number, "according to an allotment and survey made by E. J.," upon whose map the lot was represented as abutting upon a street, and the depth of the lot was stated by figures which would not include any part of the street: *Id.*

The grantor held to have dedicated such street as between him and his grantees, although his map represented it as continuing through the land of an adjoining proprietor, which closed it against any highway in one direction, and such adjoining proprietor never in any manner assented to the continuation of the proposed street, nor was any part of the street adopted as such by the public authorities: *Id.*

The grantee of all the lots on both sides of the street thus designated, held entitled to the exclusive possession of the proposed street against objection by the grantor: *Id.*

THE

AMERICAN LAW REGISTER.

JANUARY, 1862.

THE JURISDICTION OF THE COURT OF CHANCERY TO ENFORCE CHARITABLE USES.

The jurisdiction of the Court of Chancery to enforce charitable uses, is very obscure, owing to the fact that, since the statutes of Elizabeth, to be hereafter noticed, it has not been necessary, in England, to examine the subject historically. As those statutes were not re-enacted in this country, the original jurisdiction of that court becomes here, not merely a subject of speculation, but of strictly legal inquiry. The investigation must be made with most imperfect data. The student is carried back to a period when chancery reports did not exist, and in regard to which little authentic information was accessible until the publication of the results of the "record commission." Our great jurists who have made the subject a study, have not agreed in their conclusions. Among the dead who have taken a prominent part in the discussions growing out of this topic, may be mentioned the names of Kent, Story, and Marshall; among the living, that venerable sage of the Philadelphia bar, who did so much to secure to his own city the princely benefaction of Girard. Questions involving this subject have, in late years, arisen nowhere so frequently as in the State of New York. Owing to a difference of opinion among the

members of the bench, they have been discussed with great ardor and thoroughness of research.¹ It is now time to gather up the results of these discussions as well as by an independent examination of the various sources of information, to present the matter in a systematic form. As the question of the jurisdiction of the court is mainly historical, a foundation of our inquiry should be laid in an examination of the principles of the Roman law upon the subject of charities.

The principles of the civil law concerning charities.—Charity was one of the earliest and finest flowers of Christianity. While the administration of charitable funds occupied the attention of Roman rulers during most of the period of the Empire, no trace can be found of such property in those twelve tables so greatly extolled by Cicero, nor in any of the sources of law during the period of the republic.

The church, from the outset, devoted its revenue to the use of the poor, because it was regarded as their patrimony. The bishop was the legal depositary of these revenues. Under him were superintendents, who had the actual disbursement of the income of the church. The deacons were declared to be his "hand, mouth, and soul." Hospitals were established to simplify their labors, called *xenones* or *xenodochia*. The nurses, here employed, formed one of the minor orders of the clergy, and the office of the modern Sisters of Charity was anticipated as early as the days of St. Jerome. This class of establishments, whether founded by the bishops or not, was placed under their care, as their administration was regarded as a matter essentially ecclesiastical.

Contributions for the use of the poor were treated as religious acts. The writings of the time mention many legacies in which the testator provided by the same gift both for the support of the indigent, and for the forgiveness of his sins.² The revenues pro-

¹ Among the recent arguments of counsel, pre-eminent for historical research and affluence of learning, may be noticed that of W. Curtis Noyes, Esq., of the New York bar, in the case of *Beekman vs. The People*—Ct. Appeals.

² This form of gift was greatly employed in the Middle Ages.

vided for charitable purposes were tithes, legacies, donations of movables and immovables, given to churches and otherwise. These gifts became so numerous, and were, at times, so improper, that conscientious bishops returned them to the next of kin, stating, that though they were valid by the human law, they were void by the divine law. The resources of believers were apparently poured out without stint, both because it was a privilege and a duty to support "Christ's poor."¹

At the time of Constantine, charity became organized and systematized. Individual almsgiving was mainly displaced by the dispensation of charity through regular channels. The churches acquired legal rights to hold property. The Church of Rome possessed houses and lands not only in Italy and Sicily, but in Syria. Asia Minor, and Egypt. Charity flowed, in general, through such channels as the church provided. The *State*, as such, in a few instances previous to the time of Justinian, had bestowed charity for special and peculiar reasons; but, in his reign, it abdicated such functions through sheer exhaustion, and definitely left the charge of the poor to private and to voluntary benefactions.

The monasteries, from an early period, admitted into their bosom a crowd of poor, who could have found elsewhere no means of subsistence. They were also places of refuge, and supplied the means of education to children.

The objects of charity were very diversified. Besides the support of the poor and the sustentation of hospitals, the redemption of captives was in a large measure made by the aid of the church. Severity of taxation was also alleviated. It was said by one that "Christ chose to be born at the time of a census for the purpose of teaching collectors their duty of equity and mercy."

Legislation followed in aid of the efforts of the church. This was of a two-fold character: *First*, in providing peculiar rules in favor of legacies to pious uses; and, *Second*, in the establishment of rules for the administration of the charity.

¹ This continued to be true down to the time of Justinian. "Some with the highest hope in God, and to save their souls, run to the churches, bringing and bestowing all their property for the use of the poor and needy."—*Cod.* 1 3, 42

I. In the time of Valentinian and Marcian, A. C. 452, it was provided that legacies in favor of the poor should be maintained, even though the legatees were not designated.¹ It would appear to be implied from this passage that a legacy left to "undesigned persons" was, in general, void. What the words "uncertain person" (*incertus persona*) mean, is not entirely clear. It would seem, from another part of the code, that they included guilds or associations, as well as individuals. Cod. VI. 48.²

Leo and Anthemius enacted that, notwithstanding the uncertainty of persons, every legacy or *fidei commissum*, made for the redemption of captives, should be, in the course of the year, consecrated to that use by the bishop of the place. The text, so far as this branch of the subject is concerned, is as follows: No heir or legatee shall in any manner unjustly disappoint the intention of the testator by asserting that a legacy left for the redemption of captives is *uncertain*. If the testator named any one by whom he desired that such legacy should be carried into effect, let such person have the liberty of exacting the legacy or trust, and let him scrupulously fulfil the wish of the testator. But if no person is designated, and the testator has only fixed the amount to be used for this purpose, let the bishop of the place where the testator was *born*, have the power to demand the gift. But when the testator who has left such a legacy lives beyond the limits of the Empire, (*barbaræ sit nationis*,) and doubt arises in respect to his native country, let the bishop of the State in which the testator *died*, have the power to receive the legacy."³ It appears from this passage that the bishop was only made superintendent in cases where the testator had provided no method for carrying the will into effect, and had only fixed the amount to be appropriated to a charitable purpose.

Where the language of the will was indefinite, and not capable

¹ Id quod pauperibus testamento vel codicillis relinquitur non ut incertis personis relictum evanescat, sed omnibus modis ratum firmumque consistat.—*Code*, 1, 3, 24

² The edition of the *Corpus Juris*, from which citations are made, is Beck's *Leipsic*, 1831.

³ *Code*, 1, 3, 28.

of precise application, provision was made by Justinian for an arbitrary method of determining the testator's intention. The Roman law did not favor methods of interpretation so strict as those which have prevailed in modern times. The rule that oral evidence is not admissible to vary the meaning of a written instrument, seems to have been expressly repudiated by Justinian. He says: "where the deceased had in his mind a different word from that which he used, we decided, in the case of a certain Ponticus, that the written language should not prevail over the truth." With such notions we should not be surprised that he established the following constitutions: "Since we have in many wills found provisions in which our Lord Jesus Christ is named as heir, without the mention of any chapel or church, and since we have seen *that much uncertainty thence arises according to our ancient laws*, we determine, by way of *emendation*, that in such a case the holy church of the city or district where the deceased resided, must have been intended to have been instituted heir. The same view is to be adopted in the case of a legacy or of property given in trust (*fidei commissum*), and the church is to hold it in trust for the poor. If the gift was made to an archangel, or to one of the blessed martyrs, a provision which I have known to be made by one of high rank and learned in theology and law, it should be bestowed upon a church constructed in honor of that archangel and martyr; but if there be none such, then upon the Church of the metropolis," &c.

2. The law would compel a donor to carry pious intentions into effect when the intentions *had assumed a legal form*. Thus, if a donor had devoted property to a saint, prophet, or angel, to construct a church, and had proclaimed the gift to a magistrate, he and his heirs must carry the provision into effect. The same rule was applied to gifts in behalf of hospitals. The bishops and governors of hospitals were charged with the duty of observing that the intention was effectuated.¹ In fact, by the direction of Jus-

¹ The *administration* of the funds was to be in accordance with the donor's intentions; *administratio secundum ea quæ his qui liberalitatem exercuerunt visa fuerunt et secundum præscriptos fines fiat*.

tinian, every gift (*donatio*) to charitable purposes exceeding five hundred solidi, must have been made in judicial form. It was otherwise void.¹

3. Heirs or legatees could be compelled to erect buildings for charitable purposes. In case of a church they were allowed three years, in case of a hospital, a single year, to complete the necessary structures, and, in the meantime, a building might be hired, in which beds for the sick could be made until the hospital was constructed. If the heirs did not perform the duty within the specified time, the bishop and President of the province could insist on its fulfilment.²

4. If a gift to charitable uses could not be carried into effect in the manner in which the testator provided, his main design must be observed, and the property must, in some other form, be devoted to a charitable use. This was not so wide a departure from the intention of the donor as it might seem, because the principal reason, "the forgiveness of sins," would still exist. The *cy près* doctrine, thus originated, is not *theoretically* objectionable so long as the primal idea of charitable gifts prevailed; the religious duty of the donor and his consequent reward.

Like principles prevailed if the testator made the poor his heirs. The hospital of the State or city obtained the property, and its managers divided the income among the sick, either through the receipt of rents, if lands were given, or, if movable property had been bestowed, by the purchase of immovable, so that an annual and permanent support might be secured to them. "For who need help more than those who find themselves in poverty and in a hospital, and who, on account of corporeal weakness, cannot obtain the means of life." The hospital stands in the position of an heir: can bring actions for debts, and must respond to creditors. If there are several hospitals, then the gift went to the one which needed it most, to be determined by the bishop. These provisions

¹ Cod. 1, 2, 19.

² The objects to which gifts "*ad pias causas*" might be made were churches, hospitals, houses for the sick, poor, aged, and for foundlings, the poor themselves, and the State. *Id.*

were only applicable in cases of uncertainty in the disposition of the property. If the donee was ascertained, whether an individual, or an organization for charitable purposes, the funds belonged to the person or organization designated. *Sin autem in personam certam venerabilem certumve domum respexerit, ei tantummodo hereditatem vel legatum competere sancimus.* This decree was accompanied with the sternest threats in case the administrators of the property derived, or allowed others to derive, any personal advantage from this sacred trust.

5. A gift to pious uses was privileged above other legacies. Thus, as a general rule, a testator could not so dispose of his property as to withdraw it entirely from his heirs. The part of his estate which they could claim was termed the "falcidian portion." But a testator could, by adopting a particular form, bestow all his property for pious purposes, even though his object was to evade the law, (*ad declinandum legem falcidiam.*) Justinian is careful enough to provide, in a special title, *how* this evasion may be made by the testator.¹ This idea of the privileged character of a legacy to pious uses, which had its germ in the civil law, produced most fruitful results when transplanted into the canon and ecclesiastical law, as will be seen hereafter in citations from Swinburne and other authorities.

6. The State favored this class of gifts by providing that they should be exempt from taxation for profits, and also by establishing a different term of prescription in claiming them, from that which prevailed in other cases. Code 1, 2, 23.

II.—*The method of administering charities.*—1. The general control of a charity, if not placed by the testator under the care of particular persons, was given to the bishop or governors of hospitals, but they were not independent of the State. Thus, in the directions of Leo and Anthemius respecting the application of funds set apart for the redemption of captives, it was required that the bishop should make known to the governor of the province, by a written statement, the time when the funds were

¹ Code, 1, 3, 49.

received and the amount paid. After the lapse of a year he was required to state, in the same manner, the number of captives redeemed, and the amount paid for them, so that it might be certain that the pious intentions of the testator were carried into effect. In all these engagements the bishop was expected to act gratuitously, in order that the funds might not, under the pretence of beneficence, be wasted in the expenses of courts. Justinian provided that no gift to the bishop or a governor of a hospital should belong to him personally, but should be devoted to the charitable purpose. He urges the celibacy of the clergy, on the ground that charitable funds will otherwise be wasted in providing for their families.¹

2. While the testator could select those who should dispense his bounty, the bishop superintended their management, being required "to have a watchful eye over them, to praise them when they fulfilled their duty, to chide and remove those who are negligent, and, in such case, to appoint other trustees, who had the true fear of God in their hearts, and the final day of judgment in their eye."

3. But it was not enough that the law had thus placed the bishop over the governor of the charity, and had made that ecclesiastic, in turn, amenable to the archbishop or to the Governor of the Province. Every citizen, without distinction, was empowered to make a judicial complaint that the charitable intention of the testator was not fulfilled, because it was a matter that concerned the public weal; and the bishop was solemnly cautioned, that by such criminal delay on his part, he not only incurred the risk of punishment of Heaven, but also that he would suffer from the wrath of the Emperor. This remarkable passage from the Code, shows that the great principle of the *public nature of a charity*, was judicially recognised to the same extent as at present, although no officer like the attorney-general was employed to represent the public, in a proceeding to establish the public right.²

4. Provisions of a complicated nature were established, to prevent the sale or alienation of charitable estates. Justinian must, from his frequent ordinances on this subject, have paid great atten-

¹ Code, 1, 8, 42.

² Code, 1, 8, 46.

tion to the details of the management of this kind of property. The trustees, who for the time being had the control, were not allowed to compound the yearly rents for a gross sum, and thus put themselves in a position to expend the whole estate. "Were it otherwise, the yearly rents *and the eternal remembrance of the dead, on account of which he left the property*, shall not remain, but it and the estates will vanish together." All such, and other alienations, were declared to be void, and the governor of the charity had, notwithstanding the alienation, power to demand the property again by a legal proceeding. No period of prescription barred the right. The purchaser had no claim upon the fund for indemnity.¹

In another constitution Justinian reiterates his statements in respect to the permanent nature of a charity, and rises to higher reasons for it than the narrow and selfish one of simply preserving the memory of the deceased donor. "While," he says, "a certain term of life is given to each man by his Creator, which ends with death, in respect to those pious institutions which are under the continuing protection of God, this is not the case; and so long as they exist (for they continue forever, so long as the name of Christ exists and is worshipped among men), it is just that their revenues should continue forever, in order that they may serve for the pious objects which will themselves never cease."² He proceeds to enact, in still stronger terms, that no injury shall happen to these institutions by the alienation of their property, but that they may demand it, without diminution, from the purchaser. Finally, in the 7th Novel of Justinian, the Emperor established a digested and systematic series of rules respecting the right of churches, hospitals, and the various asylums for orphans and the aged,³ to alienate their property. It was conceived in the Greek language, that it might be of universal application to his empire. All right of alienation was taken away from each of these institutions, except that the Emperor might take the property, if necessary, for the public good.

¹ Code, 1, 3, 46. ●

² Code, 1, 3, 57.

³ These institutions were always classed together as *being consecrated to God*. Consecratæ Deo sedes. (Ecclesiæ videlicet Xenodochia, et atropa et orphanotropa.) Const. 13, Leo.

The right of "eminent domain" can be exercised, upon the principle so happily established in modern times, by *paying a just compensation*. This remarkable passage is as follows: "Permittimus igitur Imperatori ut si quædam in commune utilis et ad reipublicæ utilitatem spectans necessitas adsit, quæque possessionem ejusmodi rei immobilis qualem proposuimus, exigat, eam a sanctissimis ecclesiis reliquisque sacris domibus et collegiis illi accipere liceat ut tamen semper, sacræ domus *indemnes servantur et ab accipiente res æqualis vel major quam data est, vicissim detur.*" The reason given for the exercise of the right is also far-seeing. There is but a slight difference, in the eye of reason, between such property as is devoted to charity, and that which is given to ordinary public uses. (Neque enim multum inter se differunt sacerdotium et imperium neque res sacræ a rebus communibus et publicis.) He but anticipates the classification of charities in the statute of 43 Elizabeth, where provisions for the building and support of bridges are coupled with the supply of funds for the support of hospitals.

This constitution also protected these institutions against improper acquisitions. If sterile land was sold to them as fertile, or even given to them, it could be returned, and the price demanded. But if land had been sold by the charitable institution, it could be demanded again without returning the price to the purchaser. This was a penalty imposed upon him for presuming to enter into a contract which was forbidden by public policy.

Particular churches received the right to sell their property on making application to the Emperor, as was the case of the "Church of the Resurrection" at Jerusalem (40th Novel). "The prohibition against alienation was established for the good of the church. Why should not alienation be permitted when a greater good can be derived from the sale?"¹

The general law was subsequently modified by a provision permitting the property to be alienated to pay public or individual

¹ Corpus juris Civilis, Vol. 4, p. 259, Ed. Beck.

debts upon a judicial examination of the case, and with the observance of great precautions that no fraud should be practised.¹

The general scope of this legislation is nowhere more clearly shown than in the special provisions established for the province of Mysia. It appeared from the representations of a certain bishop, that many houses had been left to the church for the redemption of captives and the support of the poor, but that these objects could not be accomplished, from the nature of the property. The Emperor responds, that wherever the lands yield a certain rent they must not be sold, for the charitable object can be accomplished by means of the rent. But if the property yields no rent, or is dilapidated, or far distant from the church, it may be sold, and the proceeds applied to these two purposes only, in favor of liberty and life; for the possession of property cannot be so necessary as is the freedom of the captive and the sustentation of the poor. If the land was sold merely on account of its distance, the testator must have given in his will his consent to a sale, and his very words must be incorporated into the instrument of alienation.²

These various provisions are systematized in the one hundred and twentieth constitution, which allows charitable property in other places besides the metropolis to be leased by a perpetual lease rendering rent. If it became necessary to sell land to pay debts, it was to be publicly advertised, so as to create a competition among purchasers. The buyer was to pay the price down. If no purchasers could be found, the property was to be transferred to the creditor at a valuation. The land was to be taken instead of payment, the tenth part of the estimated value being added to the original valuation, as its price.³

The results of this examination may be briefly recapitulated. The Roman law greatly encouraged the gift of property for charitable purposes, under which term were included foundations for

¹ C. J. C., Vol. 4, p. 280.

² C. J. C., Nov. 65, 4 Vol. 836.

³ The meaning of this sentence may not have been correctly apprehended. The text is, "*justa et diligente estimatione facta, atque decima parte totius estimationis pretio ad eandem quantitatem addita*."

churches, hospitals, and asylums for the poor and aged. It could be given either by gift *inter vivos*, *causa mortis*, or by will. Immovables could be devoted to such purposes, as well as movables, and a donor might direct that money should be appropriated to the purchase of land. No legacy of this kind was allowed to fail because it was uncertain, if the design of the testator was to bestow it for charitable purposes. Such gifts were privileged above others. A donor who had, in an authentic manner, declared his intention to make such a disposition of his property could be compelled to carry it into effect.

The donor could himself select those who were to manage his bounty and prescribe the purposes to which it should be applied. His directions must, if possible, be strictly complied with. If his intention could not be exactly carried out, his main design must be accomplished. If he made no selection, the gift was managed by the bishops or by the heads of hospitals and asylums. They were obliged, in some cases at least, to render an account of their trust. Improper "trustees, (as we may term them for want of a better name,) were removed and new ones appointed. Charities were public in their nature, and any citizen could complain if they were not duly administered. Charitable property could not be placed in the same category with individual property. The right to the latter terminated at death; but the design of a charitable gift was that it might be perpetual, both in order that the name of the founder might not be forgotten, and because charitable objects were in their own nature enduring. In general the property could not be sold, although it might be leased. The transfer was contrary to the policy of the law, and the purchaser must devote the property to the trust. The right of "eminent domain" was, however, superior to that of the charitable use, on condition of the payment of a just compensation for the property. It might be sold for the payment of debts, but not because it was unproductive, unless it so happened that the testator had expressed an intention to that effect in his will, and then only in special cases.

We can but wonder at the admirable system which was thus devised in the main by a single emperor, Justinian. The general

principles of this branch of the law, as administered at the present day, were then clearly recognised.

THE ENGLISH LAW BEFORE THE STATUTE OF ELIZABETH.

It cannot be doubted that, after the fall of the Roman Empire, and during the middle ages, charitable gifts continued to be made. The limits of this article do not admit any full citation of early cases. The great motive which prevailed during the empire still continued to be expressed, the "forgiveness of sins" and consequent reward. No more striking instance of this, perhaps, exists than a gift made by Baldwin, Count of Flanders, in the year of the Norman Conquest, 1066: "Moreover, my wife desiring to be a partaker with me in almsgiving and reward from our Lord, and remembering that word of the Lord, 'I was a stranger, and ye took me in; I was hungry, and ye gave me food,' I have given a villa to a church for the support and refreshment of the poor."¹

Without stopping to show that charitable gifts of a similar kind were made in England, as could be easily done, we may proceed to inquire in what methods gifts of property might be made. They might either be of land or personal property. If *land* were transferred, it might either be by a direct conveyance, through the medium of uses, or in certain localities by a will. As our object is to investigate the jurisdiction of Chancery to enforce the gift in this class of cases, the inquiry will be confined to the question whether a transfer of land for charitable purposes could be made at common law through the medium of feoffments to uses and through wills.

1. *Feoffments to uses.*

It is not necessary to our discussion to trace the origin of uses

¹ Heirs do not appear to have readily acquiesced in wills of this kind, at least if we may judge from the objurgations contained in the instruments of donation. One is as follows: "If any of our heirs shall oppose this donation, let him be anathematized, and his name be blotted out of the celestial book of the living; let him be a consort of Judas Iscariot, and, if he will not alter his purpose, may God change his senses and involve him in the doom of Ananias and Sapphira," p. 24. These maledictions would lead to the conclusion that *legal* remedies were quite imperfect. Codex Donationum Piarum. Brussels, 1824.

and the jurisdiction of Chancery over them. It is well known that they had their origin in the Roman law, and were introduced into England through the medium of the clerical chancellors. It came to be settled that an owner of land could, by simply making a feoffment of his land to another for his own use, enable himself to make a disposition of his property in a different manner from what he could otherwise have done. This arrangement would have been void at common law, as being contradictory to the feoffment.¹ But this very fact was a good reason why it should have been enforced in Chancery, as being against conscience, not to fulfil the direction of the feoffor. Thus the chancellor says, in the Year Book 7 H. VII. f. 12: "Where there is no remedy at common law, there may be good remedy in conscience, as, for example, by a feoffment upon confidence, the feoffor has no remedy by common law, and yet by conscience he has; and so, if the feoffee transfers to another who knows of this confidence, the feoffor, by means of a subpoena, will have his rights in this Court." The justices agreed with him in opinion that, where there was no remedy at common law, there would be remedy in chancery. The reporter adds, *quod nota*. The original owner was held to have a use in the land which he could enforce in that court. He could direct his feoffors to hold the property for the use of another, whereupon such person could also have the use enforced in his favor. This principle could be used to enable the owner of the land to make a will, for he could make a feoffment of the land to the use of his will. The will operated simply as a direction to the feoffors to whose use they were to hold the land after his death. This person stood in the place of the feoffor, and could enforce the direction in Chancery, and thus the heir might be disinherited.

¹ June, J., expresses the reason for this, (Year Book, 7 H. VI. 48:) "One day, between Westminster and Charing Cross, I met Master Hank, (whom God assoilsie,) and he demanded of me whether, if he should enfeoff me in fee, *proviso* that he should always have the profits of the land, who should have them. And I replied the feoffee for the deed shall be taken *more to the advantage of the feoffee* than of the feoffor, so the feoffment shall be good and the proviso void, and this was his opinion." This little glimpse of two ancient lawyers talking law as they met in the street, is not without interest.

It is not easy to say at what time this doctrine was first established. The earliest case in which the question is known to have been discussed, is in Statham's Abridgment, 31 H. VI., title Conscience, A. D. 1453. The case was heard in the Exchequer Chamber before all the judges. It was common, at that time, to adjourn Chancery questions into this Court, as will be seen hereafter.

¹“The clerk of the rolls reported a matter in Chancery that one had made a feoffment of trust, and had declared his will to the feoffee *after* the feoffment that one of his daughters should have the land. And afterwards he came to the said feoffee, and said that the one who had the land did not wish to marry, &c., and, therefore, he revoked his will, and desired that another daughter should have the land after his decease. Then he died, and the question was *which of the two* daughters had the land.” It will be observed that the very statement of the case involves the idea that the trust could be enforced, so as to disinherit the heir, because, otherwise, the land would have descended to the two daughters equally in coparcenary. After the various judges had discussed the question, Fortescue, C. J., remarked, “We are not to argue law in this case, but conscience, and it seems to me that he could change his will for special cause; put the case: I have issue a daughter, and I am sick, and I enfeoff a man and say to him that my daughter should have the land after my decease, and then I revive and have issue a son; now it is right that my son should have the land because he is my heir, and if I had had a son at the time, I would not have made such a will; *and the law is the same* if I will that *one* of my sons should have the land, and he becomes a robber, &c. And conscience comes from *con* and *scio*, to know at the same time with God; that is, to know his will as near as possible by reason, wherefore a man can have land *by our law* and *by conscience* he will be condemned.” One of the judges then expressed himself to the effect that the uses of the feoffment could not be declared after the making thereof, but only contemporaneously with it; but this was denied by the others, and Statham remarks that the residue of the matter must be sought in Chancery.

¹ 1 Camp. Ld. Chancellors, 319-20. Coke, J

This case shows that the distinction between law and equity was well understood. The term "conscience" is used as in other instances, to indicate the jurisdiction of a court of equity. Fortescue was familiar with general principles of jurisprudence.¹ From the instances he puts, he could have had no doubt that the declaration of uses could be supported against the heir. The edition of Statham's book, in which this case is found, was printed in 1470, only seventeen years after the decision.

Lord Bacon's view of the law, before the statute of uses, was evidently the same. "Men used this device to make a will. They conveyed their full estates of their lands, in their good health, to friends in trust, properly called feoffees in trust, and then they would by their wills declare how their friends should dispose of their lands, and if those friends would not perform it, the Court of Chancery was to compel them, by reason of trust, and this trust was called the use of the land, so as the feoffees had the land and the party himself had the use; which use was in equity to take the profits for himself, and that the feoffees should make such an estate as he should appoint them; and if he appointed none, then the *use should go to the heir*, as the estate itself of the land should have done, for the use was to the estate like a shadow following the body."²

In all cases of *feoffments* to uses, this extract shows, with most transparent clearness, that the use could be enforced in chancery against the feoffees, and that the only question with the court was, whether the testator had properly appointed the use; if not, the *use* descended to the heir, for that was all the interest that his *ancestor* had after the feoffment. The heir could then compel the feoffees to convey to him.

It is true that Lord Bacon, in his "Reading on the statute of uses," raises some doubt whether the decree could be made against the heir of the feoffee as well as against the feoffee himself. This point, however, does not militate against *the remedy* but only against its *extent*. In other words, this at least was true, that so

¹ 1 Camp. Ld. Chan. 318.

² Lord Bacon's Tract on "the Use of the Law," p. 57, London, 1639.

long as the feoffee *lived*, any use declared by the last will of the feoffor could be enforced against him. But it is at least doubtful whether Lord Bacon's statement upon this last point is historically correct. The case to which he refers is probably the Year Book 8 E. IV. 6. A suit in chancery was brought against three executors, and only one appeared. The question was whether the suit could proceed in the absence of the others. The court, after deciding that it could not, *converse* in respect to the question whether a "subpœna" would lie against the executor or heir. And Choke, J., said that he had brought "subpœnas" against the heir of the feoffee, and the matter was for a long time debated. The opinion of the chancellor and the justices was, that it did not lie against the heir, wherefore the plaintiff must sue a bill in Parliament. Fairfax said that *this was a good subject to dispute about, after the others* (meaning the executors) *had come in, &c.*¹ Choke's statement, that *he had known of such suits*, is certainly greatly to be preferred to the mere dicta of the judges without argument. Fairfax's remark shows that the question was not to be treated as settled. The Lord Chancellor had occupied his seat only for a few months.

Lord Bacon's version of this case would lead to the idea that Choke thought there were no instances of suing the heir, while Choke, himself, says directly the contrary, and that it was the *advice* of the judges that the subpœna did not lie, when it was evidently a mere dictum, and the decision was postponed.

It may be urged that the breach of trust involved, in not fulfilling the declaration of uses upon a will, was properly remedial only in the spiritual court. This proposition was urged to the chancellor in the 8th E. IV., Year Book, fol. 4, and was overruled. It was claimed that a case of a breach of faith, must be sued in the court Christian; but the court said that when any one was damaged by the non-performance of a promise involving confi-

¹ The original French is: Et fuit move si subpœna gist vs. execut. ou envs. un heire. Et Chok dit que il sua subpœna autfoits vs. le heire de un feoffee et le matter fuit longtemps debate. Et l'opinion de Chanc et les justices que il ne gist pas envs le heire, per que il sua un bill al Parliament. Fairfax—Cest matter est son store pur disputer apres quand les autres veign. &c.

dence, he shall have a remedy in chancery. It was then said that it was the "folly" of the plaintiff to have trusted the defendant. The chancellor replied, so you might say if *I enfeoff a man in trust, &c., if he does not do my will*, I shall have no remedy in common law, for it was my folly to enfeoff a person who would not do my will, *but he shall have remedy in this court, for God is the proctor of the foolish, &c.*¹

It will be remembered that no infringement of the *principles* of chancery took place by sustaining this doctrine. The feoffee could not claim *want of consideration*, for he had received the land upon the faith that he would fulfil the directions of the testator. The same principles which would lead the Court of Chancery to enforce a contract involving a pecuniary consideration,² would induce it to compel a feoffee to fulfil directions made in a will.

Later authorities are clearly in the same direction. Thus, in Year Book 15 H. VII. fol. 11, it was said, if one has feoffees upon confidence, and makes his will that they shall sell his land to pay his debts, the creditors can compel them to sell. And so, if the will be that a stranger should sell this land to J. S., now J. S. can compel this stranger, *by subpœna*, to sell this land to him.

In Year Book 15 H. VII. fol. 12, it is expressly stated that the ordinary or bishop had nothing to do with wills made upon feoffments to uses. Fineux, C. J., said, "if one has feoffees upon confidence, and make his will that his executors shall sell his land, now if the executors refuse the administration of the goods, still they can sell the land, because the will of land is not a 'testamentary thing,' (n'est chose testamentaire,) nor have the executors anything to do with the will, except that they have a special power conferred upon them. And if one has feoffees, and makes his will that his executors shall sell his land, and then makes no executors:

¹ Original.—Per Chancellor: Et issint poies dire si jeo enfeoff un home en trust, &c., s'il ne voit faire ma volunt jeo n'avera remedy p'vous car il est ma foly d'en feoffer tiel person que ne voit faire ma volunt, &c., mes il avera remedy en cest court Car Deus est procurator fatuorum, &c.

² This was done in 37 H. VI., 1 Ld. Camp. 319.

now the ordinary cannot meddle with the land, nor can the administrator, for the ordinary can only meddle with the testamentary matters—that is, with goods, and consequently the same rule applies to his administrator, who is his deputy. And it was lately adjudged in the Exchequer Chamber, by all the judges of England, that if one makes a will of his land, that his executors shall sell, &c., if the executors refuse the administration and to be executors, neither the administrators nor ordinary can sell or alien. And if one makes his will that his executors shall sell his land, without naming them, still, if they refuse administration and to be executors, they can sell the land.” The other judges concurred in these statements.

This doctrine is evidently in accordance with principle. The ground of the bishop or ordinary’s jurisdiction over personal property was, that in the absence of a will it should be used by him for pious purposes. As the will was an attempt to withdraw the property from his own control, he was allowed to examine and test its validity. But, as in the case of real estate, in the absence of a will the use would *descend to the heir*, no reason could be given for his adjudicating the question.

The result would seem to be that *a use of any kind* could be enforced by the Court of Chancery, and that the only question remaining for discussion is, when and in what cases could a declaration for charitable purposes, made by the original owner to the trustee, be deemed a “use.” If it comes within the definition of that term, it must, on general principles, be enforced in that court.

The examination of the term “use” will be deferred until the question regarding the jurisdiction of chancery *over wills of land*, made in accordance with the custom of London and that of other localities, is discussed.

T. W. D.

(To be Continued.)

RECENT AMERICAN DECISIONS.

In the New York Court of Appeals.

MOULTRIE ET AL. vs. HUNT.

- 1 In executing a will of personal property, the testator must observe the formalities required by the law of his domicil, and not those of the place where the will is made. The maxim "locus regit actum" has no place in English or American testamentary jurisprudence. This principle is universally true when the domicil continues to the time of the testator's death.
2. If the testator, after executing the will, changes his domicil and resides under another jurisdiction at his death, the formalities required by the new domicil must have been observed, or the will is void.
3. A will is an inchoate and provisional transaction until the testator's death, and the law may require, after its execution, new formalities to be complied with. These, as well as other formalities, must have been observed by all testators domiciled in the jurisdiction at the time of their death, without reference to their domicil when the will was executed.
4. In order that the principles of "comity" may be invoked in favor of the wills of testators domiciled elsewhere, they must have resided in another State at the time of their death. The will is then enforced in accordance with the rules of international law applicable to the subject.
5. An act done in another State, in order to create rights which our Courts ought to enforce on the ground of comity, must be of such a character, that if done in this State in conformity with its laws, it could not be constitutionally impaired by subsequent legislation. Per DENIO, J.
6. H., the alleged testator, made his will of personal estate in South Carolina, where he then resided. He did not, when it was executed, declare to the subscribing witnesses that it was his last will and testament. This declaration was not necessary by the law of that State, and it was conceded that the will was at the time properly executed for South Carolina purposes. After making his will he removed to New York, where he resided at the time of his death. In this State such a declaration is necessary. He died without republishing his will. *Held*, that the will was void, and that H. died intestate.
7. The law of the continent of Europe is not to be resorted to in determining a question of this kind, until the sources of instruction, furnished by the Courts and jurists of England and of this country, have been exhausted.

The opinion of the Court was delivered by

DENIO, J.—One of the requisites to a valid will of real or personal property, according to the Revised Statutes, is, that the

testator should, at the time of subscribing it, or at the time of acknowledging it, declare, in the presence of at least two attesting witnesses, that it is his last will and testament: 2 R. S., p. 63, § 40. The will which the Surrogate of New York admitted to probate, by the order under review, was defectively executed in this particular—the only statement which the alleged testator made to the witnesses being that it was his signature and seal which was affixed to it. It was correctly assumed by the Surrogate in his opinion, and by the Supreme Court in pronouncing its judgment of affirmance, that the instrument could not be sustained as a will under the provisions of the Revised Statutes, but that, if it could be upheld at all, it must be as a will executed in another State, according to the law prevailing there; and, upon that view, it was established by both these tribunals as a valid testament. In point of fact the instrument was drawn, signed, and attested at Charleston, in South Carolina, where such a declaration of the testator to the witnesses, as has been mentioned, is not required to constitute a valid execution of a will. Mr. Hunt, the alleged testator, resided at that time in Charleston; but, some time before his death, he removed to the city of New York, and he continued to reside in that city from that time until his death. The will was validly executed according to the laws of South Carolina.

Although the language of our statute, to which reference has been made, includes, in its generality, all testamentary dispositions, it is, nevertheless, true, that wills, duly executed and taking effect in other States or countries, according to the laws in force there, are recognised in our Courts as valid acts, so far as concerns the disposition of personal property: *Parsons vs. Lyman*, 20 N. Y. 103. This is according to the law of international comity. Every country enacts such laws as it sees fit as to the disposition of personal property by its own citizens, either *inter vivos* or testamentary; but these laws are of no inherent obligation in any other country. Still, all civilized nations agree, as a general rule, to recognise titles to movable property created in other States or countries in pursuance of the laws existing there, and by parties domiciled in such States or countries. This law of comity is

parcel of the municipal law of the respective countries in which it is recognised, the evidence of which, in the absence of domestic legislation or judicial decisions, is frequently sought in the treatises of writers on international law, and in certain commentaries upon the civil law, which treat more or less copiously upon subjects of this nature.

If the alleged testator in the present case had continued to be an inhabitant of South Carolina until his death, we should, according to this principle, have regarded the will as a valid instrument, and it would have been the duty of our Probate Courts to have granted letters testamentary to the executors named in it. The statute contemplates such a case when it provides for the proving of such wills upon a commission to be issued by the Chancellor, and for granting letters upon a will admitted to probate in another State: 2 R. S., p. 67, §§ 68, 69. These provisions do not profess to define under what circumstances a will made in a foreign jurisdiction, not in conformity with our laws, shall be valid. It only assumes that such wills may exist, and provides for their proof.

The question in the present case is, whether, inasmuch as the testator changed his domicile after the instrument was signed and attested, and was, at the time of his death, a resident citizen of this State, he can, within the sense of the law of comity, be said to have made his will in South Carolina. The paper which was signed at Charleston had no effect upon the testator's property while he remained in that State, or during his lifetime. It is of the essence of a will that, until the testator's death, it is ambulatory and revocable. No rights of property, or powers over property, were conferred upon any one by the execution of this instrument; nor were the estate, interest, or rights of the testator in his property in any way abridged or qualified by that act. The transaction was, in its nature, inchoate and provisional. It prescribed the rules by which his succession should be governed, provided he did not change his determination in his lifetime. I think sufficient consideration was not given to this peculiarity of testamentary dispositions, in the view which the learned Surrogate took of the case. According to his opinion, a will, when signed and attested in con-

firmity with the law of the testator's domicil, is a "consummate and perfect transaction." In one sense it is, no doubt, a finished affair; but I think it is no more consummate than a bond would be which the obligor had prepared for use by signing and sealing, but had kept in his own possession for future use. The cases, I concede, are not entirely parallel; for a will, if not revoked, takes effect by the death of the testator, which must inevitably happen at some time, without the performance of any other act on his part, or the will of any other party; while the uttering of a written obligation, intended to operate *inter vivos*, requires a further volition of the party to be bound, and the intervention of another party to accept a delivery to give it vitality. But, until one or the other of these circumstances—namely, the death, in the case of a will, or the delivery, where the instrument is an obligation—occur, the instrument is of no legal significancy. In the case of a will it requires the death of the party, and in that of a bond a delivery of the instrument, to indue it with any legal operation or effect. The existence of a will, duly executed and attested at one period during a testator's lifetime, is a circumstance of no legal importance. He must die leaving such a will, or the case is one of intestacy: *Betts vs. Jackson*, 6 Wend. 173-181. The provisions of a will made before the enactment of the Revised Statutes, and in entire conformity with the law as it then existed, but which took effect by the death of the testator afterwards, were held to be annulled by certain enactments of these Statutes respecting future estates, notwithstanding the saving contained in the repealing act, to the effect that the repeal of any statutory provision shall not affect any act done, &c., previous to the time of the repeal: *De Peyster vs. Clendenning*, 8 Paige, 295; 2 R. S., p. 779, § 5; *Bishop vs. Bishop*, 4 Hill, 188. The Chancellor declared that the trusts and provisions of the will must depend upon the law as it was when it took effect by the death of the testator; and the Supreme Court affirmed that doctrine. There is no distinction, in principle, between general acts bearing upon testamentary provisions, like the statute of uses and trusts, and particular directions regarding the formalities to be observed in authenticating the instrument; and I do not doubt that all the

wills executed under the former law, and which fail to conform to the new one, where the testators survived the enactment of the Revised Statutes, would have been avoided, but for the saving in the 70th section, by which the new statute was not to impair the validity of the execution of a will made before it took effect: 2 R. S., p. 68. If, as has been suggested, a will was a consummated and perfect transaction before the death of a testator, no change in the law subsequently made would affect it—the rule being, that what has been validly done and perfected respecting private rights under an existing statute, is not affected by a repeal of the law: *Reg. vs. The Inhabitants of Denton*, 18 Adolph. & Ellis, 761, per Lord Campbell, C. J.

If then a will legally executed under a law of this State, would be avoided by a subsequent change made in the law before the testator's death, which should require different or additional formalities, it would seem that we could not give effect to one duly made in a foreign state or country, but which failed to conform to the laws of this State, where, at the time of its taking effect by the testator's death, he was no longer subject to the foreign law, but was fully under the influence of our own legal institutions. The question in each case is, whether there has been an act done and perfected under the law governing the transaction. If there has been, a subsequent change of residence would not impair the validity of the act. We should be bound to recognise it by the law of comity, just as we would recognise and give validity to a bond reserving eight per cent. interest, executed in a State where that rate is allowed, or a transfer of property which was required to be under seal, but which had in fact been executed by adding a scroll to the signer's name in a State where that stood for a seal or the like. An act done in another State, in order to create rights which our courts ought to enforce on the ground of comity, must be of such a character that, if done in this State, in conformity with our laws, it could not be constitutionally impaired by subsequent legislation. An executed transfer of property, real or personal, is a contract within the protection of the Constitution of the United States, and it creates rights of property which our own

Constitution guarantees against legislative confiscation. Yet, I presume, no one would suppose that a law prescribing new qualifications to the right of devising or bequeathing real or personal property, or new regulations as to the manner of doing it, and making the law applicable in terms to all cases where wills had not already taken effect by the death of the testator, would be constitutionally objectionable.

I am of opinion that a will has never been considered, and that it is not by the law of this State, or the law of England, a perfect transaction, so as to create rights which the courts can recognise or enforce, until it has become operative by the death of the testator. As to all such acts which remain thus inchoate, they are in the nature of unexecuted intentions. The author of them may change his mind, or the State may determine that it is inexpedient to allow them to take effect, and require them to be done in another manner. If the law-making power may do this by an act operating upon wills already executed, in this State, it would seem reasonable that a general act, like the statute of wills, contained in the Revised Statutes, would apply itself to all wills thereafter to take effect by the death of the testator in this State, wherever they might be made; and that the law of comity, which has been spoken of, would not operate to give validity to a will executed in another State, but which had no legal effect there until after the testator, by coming to reside here, had fully subjected himself to our laws; nor then, until his testamentary act had taken effect by his death.

It may be that this conclusion would not, in all cases, conform to the expectations of testators. It is quite possible that a person coming here from another State, who had executed his will before his removal, according to the law of his former residence, might rely upon the validity of that act; and would die intestate, contrary to his intention, in consequence of our laws exacting additional formalities with which he was unacquainted. But it may be also that a well-informed man, coming here under the same circumstances, would omit to republish, according to our laws, his will, made at his former domicil, because he had concluded

not to give legal effect, in this jurisdiction, to the views as to the disposition of his property which he entertained when it was executed. The only practical rule is, that every one must be supposed to know the law under which he lives, and conform his acts to it. This is the rule of law upon all other subjects, and I do not see any reason why it should not be in respect to the execution of wills.

In looking for precedents and juridical opinions upon such a question, we ought, before searching elsewhere, to resort to those of the country from which we derive our legal system, and to those furnished by the courts and jurists of our own country. It is only after we have exhausted these sources of instruction without success, that we can profitably seek for light in the works of the jurists of the Continent of Europe.

The principle adopted by the Surrogate is that, as to the formal requirements in the execution of a will, the law of the country where it was in fact signed and attested, is to govern, provided the testator was then domiciled in such country, though he may have afterwards changed his domicil, and have been at his death a domiciled resident of a country whose laws required different formalities. Upon an attentive examination of the cases which have been adjudged in the English and American courts, I do not find anything to countenance this doctrine; but much authority of quite a different tendency. The result of the cases, I think, is that the jurisdiction in which the instrument was signed and attested, is of no consequence, but that its validity must be determined according to the domicil of the testator at the time of his death. Thus, in *Grattan vs. Appleton*, 3 Story's R. 755, the alleged testamentary papers were signed in Boston, where the assets were, and the testator died there, but he was domiciled in the British Province of New Brunswick. The provincial statute required two attesting witnesses, but the alleged will was unattested. The court declared the papers invalid, Judge Story stating the rule to be firmly established, that the law of the testator's domicil was to govern in relation to his personal property, though the will might have been executed in another State or country

where a different rule prevailed. The Judge referred, approvingly, to *Desesbats vs. Berquier*, 1 Bin. 336, decided as long ago as 1808. That was the case of a will executed in St. Domingo by a person domiciled there, and sought to be enforced in Pennsylvania, where the effects of the deceased were. It appeared not to have been executed according to the laws of St. Domingo, though it was conceded that it would have been a good will if executed by a citizen of Pennsylvania. The alleged will was held to be invalid. In the opinion delivered by Chief Justice Tilghman, the cases in the English Ecclesiastical Courts, and the authorities of the writers on the law of nations, were carefully examined. It was declared to be settled, that the succession to the personal estate of an intestate was to be regulated according to the law of the country in which he was a domiciliated inhabitant at the time of his death, and that the same rule prevailed with respect to last wills. I have referred to these cases from respectable courts in the United States, because their judgments are more familiar to the bar than the reports of the spiritual courts in England. But these decisions are fully sustained by a series of well considered judgments of these courts: *De Bonneval vs. De Bonneval*, 1 Curt. 856; *Curley vs. Thornton*, 2 Addams 6; *Stanley vs. Bernes*, 3 Hag. 373; *Countess Feraris vs. Hertford*, 3 Curt. 468. It was, for a time, attempted to qualify the doctrine in cases where the testator was a British subject, who had taken up his residence and actual domicil in a foreign country, by the principle that it was legally impossible for one to abjure the country of his birth, and that therefore such a person could not change his domicil; but the judgment of the High Court of Delegates, in *Stanley vs. Bernes*, finally put the question at rest. In that case, an Englishman, domiciled in Portugal, and resident in the Portuguese Island of Madeira, made a will and four codicils, all of which were executed according to the Portuguese law, except the two last codicils, and they were all executed so as to be valid wills by the law of England, if it governed the case. Letters were granted upon the will and two first codicils, but the other codicils were finally pronounced against. The reporter's note expresses the result in these words: "If a

testator (though a British subject) be domiciled abroad, he must conform, in his testamentary acts, to the formalities required by the *lex domicilii*." See, also, *Somerville vs. Somerville*, 5 Ves. 750; and *Price vs. Dewhurst*, 8 Simons 279, in the English Court of Chancery.

It is true that none of these decisions present the case of a change of domicil, after the signing and attesting of a will. They are, notwithstanding, fully in point, if I have taken a correct view of the nature and effect of a will during the lifetime of the testator. But the remarks of judges in deciding the cases, and the understanding of the reporters clearly show, that it is the domicil of the testator at the time of his death which is to be considered in seeking for the law which is to determine the validity of the will. Thus, in *De Bonneval vs. De Bonneval*, the question was upon the validity of the will executed in England, of a French nobleman, who emigrated in 1792, and died in England in 1836. Sir Herbert Jenner states it to have been settled by the case of *Stanley vs. Bernes*, that the law of the place of the domicil, and not the *lex loci rei sitæ* governed "the distribution of, and succession to, personal property in *testacy* or *intestacy*." The reporter's note is, that the validity of a will "is to be determined by the law of the country where the deceased was domiciled *at his death*."

Nothing is more clear than that it is the law of the country where the deceased was domiciled at the time of his death, which is to regulate the succession of his personalty in the case of *intestacy*. Judge Story says, that the universal doctrine, as recognised by the common law, is, that the succession to personal property, *ab intestato*, is governed exclusively by the law of the actual domicil of the intestate at the time of his death: Conf. Laws, § 481. It would be plainly absurd to fix upon any prior domicil in another country. The one which attaches to him at the instant when the devolution of property takes place, is manifestly the only one which can have anything to do with the question. Sir Richard Pepper Arden, Master of the Rolls, declared, in *Somerville vs. Somerville*, that the rule was, that the succession to the personal estate of an intestate was to be regulated by the law of the country in which he was

domiciled at the time of his death, without any regard whatever to the place of nativity, or the place where his actual death happened, or the local situation of his effects.

Now, if the legal rules which prevail in the country where the deceased was domiciled at his death, are those which are to be resorted to in case of an intestacy, it would seem reasonable that the laws of the same country ought to determine, whether in a given case, there is an intestacy or not, and such we have seen was the view of Chief Justice Tilghman. Sir Lancelot Shadwell, Vice-Chancellor, in *Price vs. Dewhurst*, also expressed the same view. He said, "I apprehend that it is now clearly established by a great variety of cases, which it is not necessary to go through in detail, that the rule of law is this: that when a person dies intestate, his personal estate is to be administered according to the law of the country in which he was domiciled at the time of his death, whether he was a British subject or not; and the question whether he died intestate or not, must be determined by the law of the same country." The method of arriving at a determination in the present case, according to this rule, is to compare the evidence of the execution of his will with the requirements of the Revised Statutes. Such a comparison would show that the deceased did not leave a valid will, and, consequently, that he died intestate.

Being perfectly convinced that according to the principles of the common law, touching the nature of last wills, and according to the result of the cases in England and in this country, which have been referred to, the will under consideration cannot be sustained, I have not thought it profitable to spend time in collecting the sense of the foreign jurists, many of whose opinions have been referred to and copiously extracted, in the able opinion of the learned Surrogate, if I had convenient access to the books, which is not the case.

I understand it to be conceded that there is a diversity of opinion upon the point under consideration among most writers; but it is said that the authors who assert that the doctrine on which I have been insisting, are not those of the highest character, and that their opinions have been criticised with success by M. Felix himself, a

systematic writer of reputation on the conflict of laws. Judge Story, however, who has wrought in this mine of learning with a degree of intelligence and industry which has excited the admiration of English and American judges, has come to a different conclusion. His language is, "but it may be asked, what will be the effect of a change of domicil after a will or testament is made, of personal or movable property, if it is valid by the law of the place where the party was domiciled when it was made, and not valid by the law of his domicil at the time of his death? The terms in which the general rule is laid down would seem sufficiently to establish the principle that in such a case the will and testament is void; for it is the law of his actual domicil at the time of his death, and not the law of his domicil at the time of his making his will and testament of personal property, which is to govern:" § 473. He then quotes at length the language of John Voet to the same general effect. It must, however, be admitted that the examples put by that author, and quoted by Judge Story, relate to testamentary capacity as determined by age, and to the legal ability of the legatees to take, and not to the form of executing the instrument. And the Surrogate has shown, by an extract from the same author, that a will executed in one country according to the solemnities there required, is not to be broken solely by a change of domicil to a place whose laws demand other solemnities. Of the other jurists quoted by the Surrogate, several of them lay down rules diametrically opposite to those which confessedly prevail in this country and in England. Thus, Toullier, a writer on the civil law of France, declares that the form of testaments does not depend upon the law of the domicil of the testator, but upon the place where the instrument is in fact executed; and Felix, Malin, and Pothier are quoted as laying down the same principle. But nothing is more clear upon the English and American cases, than that the place of executing the will, if it is different from the testator's domicil, has nothing to do with determining the proper form of executing and attesting. In the case referred to from Story's Reports, the will was executed in Boston, but was held to be invalid because it was not attested as required by a provincial statute of New Brunswick,

which was the place of the testator's domicile. But if the present appeal was to be determined according to the civil law, I should desire to examine the authorities more fully than I have been able to do; but considering it to depend upon the law as administered in the English and American courts, and that according to these tribunals it is the law of the domicile of the testator at the time of his death that is to govern, and not that of the place where the paper happened to be signed and attested, where that is different from his domicile at the time of his decease, I cannot doubt that the Surrogate and Supreme Court fell into an error in establishing the will.

I have not overlooked an argument which has been addressed to us, based upon certain amendments of the Revised Statutes, contained in chapter 320 of the act of 1830. The revised code of the State, as originally enacted, had omitted to make provision for the proving of wills, where the attesting witnesses resided out of the State, and their attendance here could not be procured. The Surrogates' Courts to which they committed the proof of wills of real and personal estates, being tribunals of special jurisdiction, and having no common law powers like the Supreme Court, could not issue a commission in such cases, and hence there might often be a failure of justice. It might happen, in various ways, that the witnesses to a will would reside out of the jurisdiction of this State. If the will were executed here by a resident citizen, in the usual manner, the witnesses might change their residence and live in some other State or country, when it came to be proved; or it might be executed out of the State according to the forms prescribed by our statute of wills, by a resident of this State who was temporarily abroad. In either case, the will would be perfectly valid, though the Surrogate having jurisdiction would be unable to admit it to probate for want of power to cause the testimony to be taken and returned. To remedy this inconvenience, five new sections were introduced, in 1830, by way of amendment, to the title of the Revised Statutes, respecting the proof of wills, numbered from 63 to 67, inclusive. The provision which they make is limited to the case of "a will duly executed according to the laws of this State, where the witnesses to the same reside out of the jurisdiction

of this State;" and, in regard to such wills, it is enacted that they may be proved by means of a commission issued by the Chancellor upon the application of any person interested; and detailed directions are given respecting the return of the proof, the allowance of the will, and the record of it in the office of the Surrogate having jurisdiction.

But, thus far, the proof of a will made in a foreign jurisdiction, according to the laws of such jurisdiction, and taking effect there by the death of the testator, was left unprovided for. Such wills are perfectly valid as to personal assets in this State, as was shown in *Parsons vs. Lyman*. We recognise the foreign will, according to the comity of nations, just as we do the rules of distribution and of inheritance of another country when operating upon a domiciled citizen of such country who has died there, leaving assets in this State. Then, as to the proof of such wills, the section following those just mentioned provides for the case in these words:—"Wills of personal estate, duly executed by persons residing out of this State, according to the laws of the State or country in which the same were made, may be proved under a commission to be issued by the Chancellor, and when so proved, may be established and transmitted to the Surrogate having jurisdiction," &c., § 68. The remainder of the section provides for the case of such a foreign will which has been proved in the foreign jurisdiction. Letters testamentary are to be issued in such cases upon the production of an authenticated copy of the will. It is clearly enough implied, perhaps, by the language of this section, that the will to be proved and established under its provisions, and which is allowed to be executed, as to assets, in this State, must be a legal will, according to the law of the testator's domicil in which it was executed; but, for abundant caution, a section is added to the effect that "no will of personal estate, made out of this State, by a person not being a citizen of this State, shall be admitted to probate under either of the preceding provisions, unless such will shall have been executed according to the laws of the State or country in which the same was made," § 69. Chancellor Walworth appears to have understood the words, "a citizen of this State," as used in this section, to refer

to political allegiance; and, "in the matter of Roberts's will," 8 Paige, 446, he held that the will then in question, executed in the island of Cuba, and which had been proved under a commission, and had been shown to be executed according to the laws of Spain, was a legal will, though the testator was a resident of this State at the time of his death. But he put the decision on the ground that the testator was a foreigner, and not a citizen, though domiciled here, and upon a verbal construction of the 69th section. But Mr. Hunt, the alleged testator in the will now in question, was not only domiciled here, but he was, at his death, a citizen of this State, and, consequently, the section, as interpreted by the Chancellor, has no application to the case. He, however, fully admitted the rule of law to be as I have stated it, in cases not within the influence of the 69th section. "The provision of the Revised Statutes requiring wills of personal property to be executed in the presence of two witnesses," he says, "does not apply to wills executed out of this State by persons domiciled in the State or country where the will is made, and who *continue* to be thus domiciled at the time the will takes effect by death." "As the testator resided in this State at the time of his death, in 1837, this will would be valid according to the law of the testator's domicile *when the will took effect by death*, if he had been a citizen at that time. But, as he was a foreigner, and there is no evidence that he was ever naturalized here, the amendments of the Revised Statutes of 1830, under which the present proceedings are instituted, expressly prohibit the admitting of the will to probate by a decree of this Court, unless it was also duly executed according to the laws of the country where it was actually made." But for this case, I should have been of the opinion that the words, "a citizen of this State," as used in the 69th section, did not refer to political allegiance, but were used in the sense of a domiciled inhabitant of this State. The meaning of the section would then be, that, if a person, other than a domiciled inhabitant of this State, makes his will out of this State, it must be executed according to the laws of the State or country where made, or it cannot be admitted to probate here, according to the preceding provisions of the act. The Chancellor seems to me to have taken the

same view of the statute when passing upon the execution of the will of Catharine Roberts: 8 Paige, 519. He says, "The statute, in express terms, authorizes a will personally executed out of the State, *by a person not domiciled here*, to be admitted to probate, provided it is duly executed according to the laws of the State or country where the same was made; and prohibits all other foreign wills from being admitted to probate, under the special provisions incorporated into the statutes of April, 1830." The words, "a person not domiciled here," are used in the paraphrase as the equivalent of "a person not being a citizen of this State," and I think that rendering is perfectly correct. The provisions of the act do not, in my opinion, suggest any distinction between the place where a will is actually signed and attested and that in which it takes effect by the death of the testator. They are intended to provide simply for the case of the will of a person domiciled out of the State which it is desired to prove here; and the statutory mandate is, in effect, that it shall not be established here unless it was executed according to the requirements of the foreign law.

The will under immediate consideration was not, we think, legally executed, and the determination of the Surrogate and of the Supreme Court, which gave it effect, must be reversed.

COMSTOCK, Ch. J., LOTT, JAMES, and HOYT, JJ., concurred.

The precise question discussed and adjudged in this case, has, it is believed, not been decided in England. In this country, the only case in which it has been previously adjudged, is *Nat vs. Coons*, 10 Missouri, 548. The will in that case was executed in Mississippi, the testator's domicil, in 1836. The testator removed to Missouri in 1837, and resided there till his death in 1838. It was held that the instrument was a Missouri will, and that its validity must be tested by the law of that State. This case, though it agrees in its conclusions with the present, was not fully argued, and has not been often cited. The *principles* which ought to govern the ques-

tion are well established, and evince the correctness of the decision.

I. It is a well settled rule in regard to *contracts*, that the law of the place where they are made controls the formalities and solemnities attending their execution. If valid there, they are valid everywhere.

II. It has been attempted on the continent of Europe to extend the same rule to wills. The maxim is "*locus regit actum*." The French Court of Cassation has declared that the forms of the place of making the will are to be preferred to the law of the domicil. *Felix on International Law*, 8d edit., p. 166, note a. Savigny, however, recommends that a

person who makes his will abroad should on his return make another, Vol. 8, p. 256.¹ It is only safe to follow these authors as guides, when we bear in mind that they attempt to apply to a will the same rule which exists as to a contract.

III. This doctrine has found no lodgement in the common law as expounded by the courts in England, or by text writers. Says Dr. Lushington in *Croker vs. M. Hertford*, 4 Moore, P. C., 858, "there is a wide distinction between a will and a contract." The validity of a will of personal estate as to form is to be governed by the law of the place of the testator's domicile. So that if he reside in one place, and make his will in another State, where all his personal property may be, the validity of the will is to be determined by the law of the place of his residence. The maxim "*mobilia sequuntur personam*" when applied to wills, means that personal property follows the law of the testator's domicile. The leading case on this subject is *Stanley vs. Bernes*, 8 Hagg. 373, and is so pronounced by Lord Wensleydale, in *Whicker vs. Hume*, 7 House of Lords Cases, 165. See also *Bremer vs. Freeman*, 10 Moore Priv. C. Cas. 306. That case was argued for the principle by Dr. Lushington when at the bar, and the conclusions then presented are approved by him as a judge. It was there held that an Englishman domiciled abroad (in Portugal) must conform in his testamentary acts to the formalities required by the *lex domicilii*. The reasons of the decision are not given by the

"Delegates," who reversed Sir John Nicholl's decision to the contrary, but they undoubtedly proceeded on Dr. Lushington's argument.

This argument is so clear and conclusive that it is worthy of being reproduced. "The fact of the codicils being executed in the English form, whether used as an argument to show the testator's intention of returning, or for their validity, amounts to nothing. It is said, it was his intention not to adopt the Portuguese forms; it was his intention to pass his property in England, and the question is, could he do so in the way he has adopted? If intention alone is to have effect, there would be no need of any form; but the law of all countries requires that the intention should be expressed so that the law may understand it, and that the personal property may be distributed according to its rules. If it be a clear principle of law that personal property has no locality, that the law of the place (of the property) is not to be looked to at all, it follows as a necessary deduction, that the case of a party dying leaving a will must be liable to the same rules as in a case of intestacy. *The law which binds the person governs the effects.* If then the person of the testator was governed by the law of Portugal, so must the will be—if the property is distributable by the law of Portugal, the instrument should be valid by that law. If intestate, it is conceded that his property, in whatever country, would pass according to the Portuguese law; how then are we to find whether he is intestate or not? If the will by

¹ This suggestion was made on account of Eichhorn's view, (*Deutsches Recht*, § 37), that the maxim "*locus regit actum*" has one qualification, which is that if a testator who had made his will abroad in a manner not allowed by the domicile, returned to his home before death, the will would be void. This idea has not been adopted by others.

the Portuguese law is invalid, he is intestate in Portugal. Supposing it to be valid by every other law, but invalid by the law of Portugal, then the property would go according to the Portuguese law as in a case of intestacy. We contend then on principle, if it be once established that in cases of intestacy the law of the domicile is to prevail, it must follow that in testacy, it must also, otherwise you cannot find out whether the party be intestate or not." No clearer or more compact statement of the principle can be found or desired, and the decision has been recognised over and over again. Foreign law then cannot be cited upon the subject of the testamentary acts of testators domiciled here, with any profit. In fact, it is a matter of mere municipal regulation. "There is no instance in which foreign law has been resorted to as a guide whether a testamentary paper of a domiciled Englishman should be valid or not:" 4 Moore P. C. 358. "The law of domicile is alone regarded, and the rule '*locus regit actum*' cannot prevail over it. No trace in the history of English testamentary law is to be found of the introduction of this principle, and it is difficult to discover how the laws of other nations on matters which are *purely municipal*, should form any sufficient ground for the introduction of a new statute to govern the testamentary acts of domiciled Englishmen." Id. The doctrine enunciated in *Stanley vs. Bernes* is approved in this country in the cases cited in the principal case.

IV. The question still remains as between the domicile at the time of execution of the will, and the domicile at the time of death. There are two questions: 1. By which of the two shall the "intrinsic validity" of the will be governed? By this phrase is meant, the proportion of the estate which can be disposed of,

the capacity of the testator, and of the legatees, the power to disinherit heirs, &c., &c. Nearly all jurists agree that such questions are to be determined by the law of the domicile at the time of death. Foelix on International Law, § 117. Says this author, "the intrinsic validity of acts depends on the law of the place where they have received their perfection or completion," 8 Savigny, 312; Westlake on Private International Law, 328.

2. The second question is as to the "formal or extrinsic validity" of the will. If a will is duly executed by the law of the domicile, and afterwards the domicile is changed and continues so until death, shall the law of the latter domicile prevail? Foelix answers this question in the negative. He places his determination, however, upon the maxim, which the English law discards, "*locus regit actum*." "The will preserves its validity as far as form is concerned, notwithstanding a change in the testator's domicile, *because* this form depends on the law of the place where the will was made;" (le testament conserve sa validité quant à la forme, nonobstant le changement de domicile du testateur, *parceque* cette forme depend de la loi du lieu de la confection de l'acte,) § 117, also § 77. This reason, though perfectly legitimate under the French law, is of no force here, since the decision of *Stanley vs. Bernes*, which declares the law of the domicile to be the rule which governs the original validity of the act.

Mr. Westlake, although he discards the maxim, "*locus regit actum*," as applicable to wills, agrees with Foelix in the result. His reasons are as follows: "If a change be made from a foreign domicile to an English one, we shall have to decide for ourselves on the continuing validity of the foreign will, and then I submit it should be maintained whenever

conformable either to the 'lex loci conditi testamenti,' or to the law of the then domicil, for it can never be imagined, that by the transference of his domicil to England the testator intended tacitly to revoke his will, more especially since by the continental law, with which alone from his previous life he can be supposed to be acquainted, such transference would not have that effect:" Westlake on Private International Law, § 823, 4, 5, 6, 7, 8. The author here falls into a double mistake. First, in supposing that this question is one simply of a foreign testator domiciled here, which will be shown hereafter not to be true; and, second, in maintaining that the intention of the testator has anything to do with the *validity* of a will. "The law that binds the person governs the effects." The law of the domicil at the time of the testator's death must prevail, for the following reasons:

1. Because on the distinction which the continental writers make between the extrinsic and intrinsic validity of the will, between matters of form and matters of substance, the law as to the number of witnesses, and the solemnities attending the execution of the instrument, belongs to substance, and not merely to form. The witnesses are placed about the testator to watch his capacity, and to observe that no fraud is practised, or undue influence or restraint exercised, and, in general, to see that his intentions are carried into effect. They are placed thus by the law, and not by the testator. It is true that he selects them, but the law declares their function. They are in a sense ministers of justice. Foelix candidly admits this difficulty. "The qualities of notaries, and of witnesses, may be regarded as belonging to intrinsic formalities—the circumstance that the laws exact in the witnesses of the act certain qualities which it does not require in those who

depose simply in a court of justice to facts of which they have knowledge, shows that in assisting at the making of a will, the witnesses exercise, so to speak, a public authority. Thus, the ancient authors regard the assistance of the witnesses, and their number, as a substantial, and not as a probative formality:" § 71, note 1. On this principle, in accordance with their own distinction, the foreign jurists should hold that the law of the domicil at the time of death should govern the transaction, except as to mere matters of form, such as the necessity of affixing a seal, or the writing the will upon some particular substance.

2. If a testator, domiciled in a State where he made his will, continued to be so domiciled at the time of his death, the validity of the will could only be determined at death. His capacity might be restricted or taken away, the will might be made inoperative, or its effect might be enlarged. Such a statute would be in no sense retrospective, nor would it interfere with vested rights, because heirs, devisees, or legatees, have no rights until the testator's death. The *rules of construction* would, therefore, be in no sense violated by holding that a statute of this kind operates upon anterior as well as upon subsequent wills. Cases of the first kind, affecting capacity, are *Wakefield vs. Phelps*, 87 N. H. 295; *Loveren vs. Lamprey*, 2 Foster, N. H. 484; cases of the second class are stated in the opinion; cases of the third class, where the effect of the will was enlarged, are *Cushing vs. Alwin*, 12 Met. 169, (1847); *Pray vs. Waterston*, Id. 262. They all proceed upon the same principle. Though *Brewster vs. McCall*, 15 Conn. 274, and *Mullock vs. Souder*, 5 Watts & Sergeant, 198, are contrary to this view, the principle will not be shaken. They were decided without extensive argument, without

satisfactory reasons for the judgments, and are opposed to the current of decisions. The case in *Watts & Sergeant* is made to depend upon a certificate given by the judges to the Chancellor, in *Ashburnham vs. Bradshaw*, 2 Atk. 86, followed by *Willett vs. Sandford*, 1 Ves. 176. The question there was, whether a will of real estate, made before the Statute of Mortmain, 9 Geo. 2, c. 36, the testator having survived the passage of the act, was rendered void so far as it came in conflict with that law. It was decided that the will was not affected by the statute. This case was, however, evidently disapproved by the Lord Chancellor in *Attorney-General vs. Heartwell, Ambler*, 451, where he states that the decision cannot be applicable to personal property. "The statute makes an intestacy." It could only be applied to real estate, because a devise was regarded as in the nature of a conveyance. The case itself must be considered as overruled in this country by the decisions previously cited, which were, in some instances, devises of real estate.

Assuming these cases to be correct, they decide that a statute operating upon a will, may destroy it, and that all persons domiciled here when the will was made, and when the statute took effect, would be governed by it. What possible distinction can be stated between this and other classes of domiciled persons? Many persons discuss this question as though it were one of private international law. It is, however, one of purely *municipal law*, as Dr. Lushington states it. This will appear from the following supposed cases. There may be suggested, among others: 1st. The case of a domiciled citizen, who, having been subsequently domiciled abroad, made his will and returned to his original residence. 2. The case of a domiciled for-

eigner under the same facts. 3. The case of a foreigner, who, having made his will at his home, becomes a resident naturalized citizen. 4. The case of a foreigner, who, having made his will at home, becomes domiciled here—a resident alien. The first case would resolve itself into the question, Can, or should, the State govern that class of its resident citizens who have once been domiciled abroad, in the same manner as other citizens? The laws of the State operate upon the wills of all permanently residing citizens, deciding their validity at the moment of death. Can any reason be suggested why this should not be true of *all* resident citizens? Every new statute of general nature ought undoubtedly to be construed to govern all the citizens who were subject to it at the time of its passage, unless it would operate retrospectively, or be contrary to some constitutional provision. The power of the State to give this effect to the statute, no one will deny. The foreign rule does not rest upon positive right, but upon consent, express or implied: *Fœlix*, § 68. As the question then becomes one purely of *construction* of a statute, it is impossible to state any valid reason for exempting one class of citizens and not the other. A will made abroad by a citizen afterwards returning to his native country, certainly ought not, upon principles of comity, to be any *more* sacred than one made at home.

If this be true of statutes passed *after* the citizen became re-domiciled, it would be equally true of previously existing laws. Otherwise, it would be necessary to re-enact the statutes continually to bind citizens, once residing abroad, and resuming their former domicile. We cannot, therefore, escape the conclusion, that the statute of wills ope-

rates upon all native born citizens domiciled here at their death, and that the question is wholly one of *domestic law*.

No reason can be stated why the other cases should not be solved in the same way, since the case of *Stanley vs. Bernes*, has decided that domiciled foreigners are subject to our laws regarding wills, in the same manner as domiciled citizens.

The result is, that in all cases of the execution of a will of personal estate, the law of the domicile where the will is made, is only provisional. If the instrument is not, in fact, executed according to that law, yet, if the solemnities required by the laws of the domicile at the time of death, happen to be observed, the will is valid. So, on the other hand, if the law of the domicile is observed, the will is void if the solemnities of the final residence are not complied with.

3. The rules as to the distribution of intestate's estates are admitted to be those prevailing at his domicile at the time of his death.

If that be so, the argument of Dr. Lushington, and of the opinion in the principal case, is conclusive to show that the same law must decide whether he did or did not die intestate.

4. Perhaps some weight should be given to the view that the right to make testaments belongs to the domain of positive law, and cannot be claimed as an

inherent or natural right: See the elaborate historical examination of the subject in *Maine's Ancient Law*, Ch. 6 & 7; London, 1861.

The author remarks that "it is doubtful whether a true power of testation was known to any original society except the Roman." The general argument, however, is not affected, though this proposition should prove untrue.

While no adjudged cases in England decide the point, the tendency of judicial opinion is in this direction. In addition to the cases alluded to in the opinion, *Whicker vs. Hume*, 7 House of Lords Cases, 124, may be cited, where the statement by all the judges is, that the law of the domicile, at the time of death, is to govern the will, and the following distinct expression from the Judicial Committee of the Privy Council, Lord Wensleydale delivering the opinion: "It is not necessary to discuss the question as to what law should govern when a testator changes his domicile after making his will, but their lordships do not wish to intimate any doubt that the law of domicile at the time of death, is the governing law: *Story*, § 478; nor any, that the statutes 7 W. IV. and 1 Vict. c. 26, apply only to wills of those persons *who continue to have an English domicile*, and are consequently regulated by the English law:" *Bremer vs. Freeman*, 10 Moore P. C. 306—359.

T. W. D.

In the Supreme Court of Vermont—General Term, Nov., 1861.

BRIDGMAN vs. HOPKINS.¹

In an action of slander, charging the defendant with having accused the plaintiff of the commission of the crime of adultery, it is competent for the defendant, in mitigation of damages, to prove that the plaintiff, before the speaking of the words, was commonly reputed to be unchaste and licentious.

This was an action of slander for charging the plaintiff, an unmarried man, with having had illicit intercourse with a married woman, and thereby committed the crime of adultery.

On the trial by jury in the County Court, exceptions were taken to the admission of evidence offered in mitigation of damages, that before the speaking of the words, the plaintiff's general character and reputation in the community for chastity was bad; and that he was generally reputed in the community to be an unchaste and licentious man.

(Several other exceptions were taken, but not being of much general interest, they are omitted in the present report of the case.)

J. A. Wing, Counsel for plaintiff.

B. N. Davis, Counsel for defendant.

The opinion of the Court was delivered by

BARRETT, J.—It is claimed upon the above exceptions that the evidence was improperly admitted, for the reason, that while the alleged slander consisted in charging the plaintiff with having committed the crime of adultery, the evidence of character was not restricted to general character, in reference to the technical kind and legal quality of the act charged, which rendered the words slanderous and actionable. In other words, it is claimed that no evidence as to character was admissible, except such as tended to show that the plaintiff's general character was bad in reference to the *crime* of adultery. We think the exception is not well founded. It is uniformly held, that, in this kind of action, the plaintiff puts

¹ We are indebted to the courtesy of Mr. Justice Barrett for the following opinion, for which he will accept our thanks.—*Eds. A. L. Reg.*

in issue his character, so far as the amount of damage is concerned, in reference to the subject whereof the alleged slander is predicated. The act of such intercourse, as the words charged in this case, is made a crime, and is visited with an ignominious punishment by provision of statute, contrary both to the common and ecclesiastical law : 4 Bl. Com. 65.

Undoubtedly, it is this provision of the statute that makes the words actionable *per se*. Without that provision, words charging illicit intercourse with a married woman would have no different effect, as constituting a cause of action, from words charging such intercourse with an unmarried woman. The act, in its moral and conventional character, would be the same in both cases, and would have the same bearing upon the character, moral and social, of the person committing it. The practice of such acts is *licentiousness*, and the character induced thereby is that of an unchaste and licentious man, as much so, certainly, when they are practised with *married* as unmarried women. This result is as much involved in acts, which, under the statute, are visited with penalty as a crime, as in the same kind of acts to which such penalty is not attached. When, therefore, a plaintiff comes into Court, for the reparation of the injury brought to his character by the slander alleged in this case, we think that, as the act charged necessarily involves a specific moral and social debasement, irrespective of the final consequences imposed by the statute, he comes with his character as affected morally and socially by such debasement, when it has become matter of general reputation, whether produced by his habit of licentious conduct with married or unmarried women. It would seem to present to the general sense of the community a strange incongruity, to hold that the character of a confirmed and notorious debauchee is susceptible of injury to the same extent, by the charge of a specific act of illicit intercourse with a married woman, as that of a man unclouded by any suspicion of licentious conduct, unless such character as a debauchee should be shown to exist with reference exclusively to the practice of illicit intercourse with married women ; and the incongruity would be rendered the more

palpable, if it were to be held that it would require, on this ground, the same amount of pecuniary remuneration to repair the damage to the character of the debauchee reprobate, as to that of the unsuspected chaste man.

Change the state of the case, by supposing that the plaintiff, being unmarried, by a course of licentious conduct towards *unmarried* females, had acquired a general character as a licentious debauchee. Having such a character, should he get married, and soon thereafter be charged with an act of illicit intercourse with an *unmarried* female—the same kind of act with the same quality of subject, by practising which, before marriage, he had acquired his character, and which, while he was unmarried was not criminal under the statute, it would present a rare absurdity to hold, that the fact of his marriage had so obliterated his existing character up to that time, and had so renovated and purified him, as to place him in the same category of immunity as the man whose life had ever been an ensample of purity and chastity; and the absurdity would be strongly illustrated, if he should have fallen into wedlock with a female as debauched as himself—an event likely enough to happen—and would equally involve the application of the rule claimed by the plaintiff in this case.

It seems clear, that the application of the established rule of law on this subject cannot be made to depend upon the accidental circumstance, that either party to the alleged act of illicit intercourse was married, and, by virtue of that circumstance, exclude evidence of the general character of the plaintiff for licentiousness, existing at the time the words were spoken, when such evidence is offered to affect the amount of damages which he should properly recover.

This view, in our apprehension, stands upon reasons that fully justify it, without the support of adjudged cases. Yet, as sustaining it, the case of *Stone vs. Varney*, 7 Met. Rep. 86, and of *Bowen vs. Hall*, 20 Vt. Rep. 232, may be referred to.

Judgment affirmed.

The foregoing case incidentally involves a question which, first and last, and in different forms, has occupied the time, and tasked the energy of Courts to a greater extent, than any inherent difficulty of principle involved, would seem to justify us in expecting. We mean the general question of the admissibility of evidence of plaintiff's character in actions of libel and slander. That such evidence is admissible in certain cases, we regard as fully settled, notwithstanding the exceptional cases to the contrary.

1. Where the defendant justifies words, spoken or written, which impute crime to the plaintiff, by alleging the truth of such charge, he is bound to adduce the same kind of proof, and many of the cases say, the same degree of proof, which would be required to convict the plaintiff of the offence. And the plaintiff, on his part, is allowed to encounter this evidence in the same way he would be, if he were on trial for the crime. One of these modes, where the direct evidence leaves the case doubtful, (as most cases are, more or less,) is by proof of *good* character in regard to the general nature and subject-matter of the offence charged: *Hardings v. Brooks*, 5 Pick. R. 244; 3 Greenl. Ev. § 25, 26, and note. And this evidence the plaintiff may adduce in reply to the defendant's evidence directly tending to prove him guilty of the crime, and before any attack is made upon his general character. And the English courts have gone so far as to hold, that if one on trial for a crime omit to give evidence of general good character in regard to the subject-matter of the offence, when he might do so, it affords just ground of comment to the jury, in behalf of the prosecutor.

It may be questionable, we think, how far the American courts would adopt this view; but the rule of the general

admissibility of evidence of good character on the part of the accused, is universally recognised here, and there can be no doubt of its applicability in actions of libel and slander, where the defence implies a charge of crime.

2. There can, we think, be no fair ground to question that it is competent for the defendant also to give general evidence of plaintiff's *bad* reputation in regard to the particular subject-matter of the charge contained in the words spoken or published. There has been a good deal of conflict in the decisions upon this point, and the rule in this country, in one particular, differs from that which prevails in the English courts. But most of this conflict and apparent confusion among the decided cases, may be dissipated by keeping carefully in mind the proper grounds for the admissibility of this kind of evidence.

The main ground upon which it seems to us such evidence *ought* to be received, is, that it tends to rebut malice in the defendant. And here, it seems to us, that the English cases, where evidence has been received to show that the plaintiff, before the alleged slander, was generally reputed to be guilty of the particular offence or misconduct charged, is more pertinent to the question of damages, than general reputation that he had been guilty of *similar* miscarriages, but not the *same*. It is, perhaps, a difference in degree, rather than in kind; but if the former is admissible, then it follows, as it seems to us, *a fortiori*, that the latter must be. And this will be the result, whether we view it in the light of rebutting malice in the defendant, or of affording the plaintiff only such images as he has sustained.

It is obvious, in the majority of actions for defamation, the measure of damages is far more seriously affected by the degree of malice on the part of the de-

fendant, than by the positive amount of injury or damages suffered by the plaintiff. And there are many instances where the attempt at defamation on the part of a malicious defendant, has produced a positive reaction in favor of the plaintiff, whereby his reputation is raised to a higher and far more enviable point, than if it had not been assailed, and thus a positive accession of credit comes from the very misconduct of the defendant. This, nevertheless, is no excuse in law, and generally produces no abatement in the damages awarded by the jury, provided the conduct of the defendant has been wholly without apology or excuse, and in its nature wanton and wicked. *Calloway vs. Middleton*, 2 A. K. Marsh, 372.

Hence it is apparent that that is far more effective evidence on the part of the defendant, which presents an excuse or occasion for him to have acted, through imprudence and want of consideration, by giving too hasty credence to flying rumor, or general opinion, without testing its foundation; than that which shows that the plaintiff has suffered but slight damages, in fact, in consequence of his former bad reputation upon the same point.

And it is by no means certain that persons of a dubious reputation upon a given subject suffer less, in consequence of a distinct false charge, from a reputable source upon the very point where they were before a little tender, than

would another whose reputation is entirely unquestioned in regard to it. Our own observation would lead us to the contrary conclusion; and, therefore, we should say that the chief benefit derivable from evidence of this character on the part of the defendant must be sought in its effect in rebutting malice. And there can be no question it would be most effectual in this way if accompanied with probable proof of good faith and sincerity on the part of defendant in giving currency to the accusation, which would be a very natural inference from the general belief of the public upon the point, unless there was evidence of special evil intent on the part of the defendant. And it is unquestionable, that the effect of this general evidence of bad repute on the part of plaintiff, would be more efficient in rebutting all presumption of malice on the part of the defendant, where it went to the very act of which he was led to accuse the plaintiff. And this is precisely the class of evidence which the English courts have generally held admissible: *Earl of Leicester vs. Walter*, 2 Campb. 251; ——— *vs. Moor*, 1 M. & S. 284.¹

The question is made in some of the English cases whether the same rule of evidence will apply where the defendant pleads in justification the truth of the words with the general issue. *Snowdon vs. Smith*, in note to 1 M. & S. 286. So, too, many of the American cases have rejected general evidence of bad reputa-

¹ If the question of damages in actions of slander were to turn mainly upon the actual injury done to the plaintiff, it might be competent for the defendant to reduce the amount of the recovery, by showing his own bad reputation for truth, and the good reputation of the plaintiff upon the subject of the accusation, whereby it would naturally happen that the accusation would fail to gain any degree of credit, and consequently to damage the plaintiff to any great extent. But it is notorious that, in actions for defamation, the positive injury suffered by the plaintiff is one of the last and least of the ingredients which go to make up the damages awarded

tion on the part of plaintiff, in consequence of defendant having plead in justification. *Root vs. King*, 7 Cow. R. 618; *Paddock vs. Salisbury*, 2 Cow. R. 811. But it is obvious that upon principle there can be nothing in any such distinction. It goes upon the assumption that such evidence will improperly prejudice the finding of the jury upon the other issue in the case. But such an objection lies equally in all cases of jury trials where there are different issues, which is almost, of necessity, always the case. A proper respect for and confidence in the competency and impartiality of jurors to discriminate in regard to the different issues before them, and make the requisite application of the evidence to them, would remove all objection upon this ground. Hence, in the majority of the best considered cases, this objection has been regarded as having no foundation in reason or principle. If the evidence is competent to be received, upon any issue, it remains competent so long as that issue remains to be tried, whatever other issues may also be for trial at the same time. *Stone vs. Varney*, 7 Met. R. 86; *Vick vs. Whitfield*, 2 Hayw. 222; *Calloway vs. Middleton*, *supra*; *Sawyer vs. Hopkins*, 9 Shepley, 268; *Henry vs. Norwood*, 4 Watts, 347; *Lamos vs. Snell*, 6 N. H. R. 443; *Bowen vs. Hall*, 20 Vt. R. 232, and cases there cited by Davis, J.

The only leading case which has called the general doctrine of the admissibility of such evidence in question, is that of *Jones vs. Stevens*, 11 Price, 285-288. This is, on many accounts, a remarkable case.

1. The evidence was offered upon false grounds, and was, of course, rejected upon false grounds, so that, while the reasoning of the judges is all unobjectionable in the main, the decision is altogether erroneous. The evidence was offered to con-

tradict the prefatory averments in the declaration, that the plaintiff has always sustained a good character, and also to establish a general plea that he had been guilty of dishonorable practices as an attorney, without specifying the particular facts relied upon. The Court held, very properly, that such a plea was bad, and made a most wonderful flourish of rhetoric in denunciation of such a mode of pleading, which was all unnecessary, since the decided cases sufficiently condemned it. *J'Anson vs. Stuart*, 1 T. R. 748; *S. C. 2 Smith*, L. C. 80, and cases cited in notes, both English and American.

2. The judges go out of their way to argue the absurdity of receiving evidence upon the ground of contradicting the mere inducements of the declaration, without seeming to comprehend that there were any other grounds upon which it could be received.

3. To complete the climax of judicial eccentricity, the Chief Baron rises in his seat upon the bench, and, addressing himself to the aged Baron, Wood, who had just pronounced an opinion, more wordy than wise, and far more rhetorical than sound: "Upon the unimpaired vigor of intellect, and unabated learning which he had evinced in the discharge of his high duties:" and expressed the thanks of the Court "for the very effective and decisive part he had taken in the determination of the important questions" involved.

And all this scenic exhibition is made in an English court of law, upon occasion of the decision of an inferior tribunal, against all the former decision of co-ordinate courts, and all the analogies to be derived from principle and reason—a decision which has never been followed to any extent, either in England or America. The case seems to have excited very unusual interest at the time, and was

argued by the most distinguished of the English bar of that day—such men as Brougham, Bayley, Jervis, and Taunton. It was an action for libel upon an attorney in his professional capacity. The case, for some reason, seems to have attracted a share of interest, both at the bar and upon the bench, quite out of proportion to the importance of any legal question involved, and, as is not uncommon in such cases, probably received a wrong bias on that account, by which a just result may have been reached in the particular case, but quite at the expense of proper adherence to legal rules and principles. The only English case which we have noticed following this lead is the *N. P.*, one of *Bracegirdle vs. Bailey*, 1 F. & F. 586, and we have no belief that it will finally prevail in the Court of last resort.

There are many analogies in the law of libel and slander which lead us to conclude that the English rule first stated is the true one.

Any evidence tending to show that the plaintiff was liable to suspicion of being guilty of the offence, short of a full justification, may be given in evidence in mitigation of damages.

So, too, where the defendant only repeated what he heard from another, giving the name of the author at the time, it may always be received to lessen damages; and most of the cases hold it a full justification of merely verbal slander, inasmuch as it adds nothing to the

force of the accusation to repeat it in that mode, and when done in good faith should involve no actionable responsibility. *McPherson vs. Daniels*, 10 B. & Cr. 268. The resolutions in *Lord Northampton's case*, 12 Co. B. 184, are here regarded as qualified in the important particular, that to justify the repetition of verbal slander invented by another, it is requisite to allege and prove that defendant did it in good faith, believing it to be true. *Tindal, Ch. J.*, in *Ward vs. Weeks*, 7 Bing. R. 211. See, also, upon the questions discussed, *Starkie on Slander*, 218, and cases cited by the American editor; see, also, *Tidman vs. Ainslie*, 28 Eng. L. & Eq. R. 567; *Woolmer vs. Latimer*, 1 Jur. 119; *Duncombe vs. Daniell*, 2 Jur. 32.

In regard to the particular form of the question involved in the principal case, and the decision made by the court, there is no reasonable ground of doubt except upon the basis of the English rule requiring proof of plaintiff being guilty of the very offence. One might feel surprise at the refinement of the distinction attempted, in this case, by the counsel, as indicated by the opinion of the court, if there were not too much ground to admit that such refinements sometimes find favor with courts, so that the duty of counsel to his client requires him to urge every plausible argument in favor of his cause, without much regard to its probable fate with the Court.

I. F. R.

RECENT ENGLISH DECISIONS.

HOUSE OF LORDS.

Ewart vs. Cochrane, May 11, 1861.

When two properties are possessed by the same owner, and there has been a severance made of part from the other, anything which was used, and was necessary for the comfortable enjoyment of that part of the property which was granted, must be considered to follow from the grant.

A. M., the owner of two adjoining properties, consisting of a tan-yard and a house and garden, made a cess-pool in a corner of the garden, and a drain to carry the water into it from the tan-yard, which gradually sloped down towards the garden. In 1819 he sold the two properties to different persons. The conveyances made no allusion to the existence of the drain and cess-pool. *Held*, that the easement passed by an implied grant with the tan-yard.

Backhouse vs. Bonomi, June 25, 1861.

The plaintiffs were the owners of the reversion of an ancient house. The defendants, more than six years before the commencement of the action, worked some coal mines two hundred and eighty yards distant from it. No actual damages occurred until within the six years. The Exchequer Chamber held (reversing the judgment of the Court of Queen's Bench), that no cause of action accrued from the mere excavation by the defendant on his own land, so long as it caused no damage to the plaintiffs, and that the cause of action accrued when the actual damage first accrued, and therefore the statute of limitations was not a bar. This judgment was affirmed in the House of Lords.

COURT OF CHANCERY.

Life Association vs. Siddall, February 9, 1861.

Length of time where it does not operate as a statutory or positive bar, operates simply as evidence of assent or acquiescence.—A cestui que trust, whose interest is reversionary, is not bound to assert his title until it comes into possession. He is not, however, less capable of giving his assent, by acts or otherwise, to a breach of trust, by reason of his interest being in reversion.

The proposition laid down in the case of *Browne vs. Cross* (14 Beavan, 105), that a cestui que trust having knowledge of a breach of trust, is bound, although his interest may be reversionary, to take proceedings to have the matter set right, otherwise that he will be held barred by acquiescence, not approved.

A cestui que trust is not bound by acquiescence unless he has been fully informed of his rights, and of all the material facts and circumstances of the case.

Forrest vs. The Manchester, Sheffield and Lincolnshire Railway Company, July 13.

A railway company were required to keep up a ferry communication between certain points on the river H., and for this purpose were obliged, on certain days, to employ a much larger number of steamboats than were required upon ordinary occasions. The company employed the steamboats, when not required for the purposes of the ferry, in running excursion trips. A bill was filed, complaining that the company were acting *ultra vires* in so employing the vessels. It appeared, by the evidence, that the plaintiff was a large shareholder of a steam navigation company, which was affected by these excursion trips, and that the said suit was directed by the last-mentioned company, who had indemnified the plaintiff. Sir J. Romilly, M. R., held that the defendants were not acting *ultra vires*, and dismissed the bill. On appeal, the decision was affirmed, but on the ground that the suit was illusory, and not in fact the suit of the plaintiff, but of a rival company.

Stokoe vs. Cowan, May 14.

An insolvent debtor, within a month of his decease, and while suffering from illness which there was no probability of his recovering from, assigned policies of insurance on his own life for £800, in consideration of the release of a debt of £174. In a creditor's suit for the administration of the debtor's estate, the assignment was held to be voluntary and void under the statute of Elizabeth. The assignment was ordered to stand as a security for the amount of the debt due at the time of the assignment, with interest at £4 per cent.

Policies of insurance are "securities for money" within the 12th section of the 1 and 2 Vict., c. 110.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF MASSACHUSETTS.¹*Warranty on sale of Chattels—Parol Evidence to vary Written Contract—Damages for Breach of Contract—Construction of Contract.*—

In an action to recover damages for the breach of an implied warranty of reasonable fitness, the following contract was proved: the defendants wrote to H., who was then a partner of the plaintiff's, on March 29th, saying, "we propose to make you eighteen or twenty-two retorts in dry sand, with two heads each, like the one furnished you in February last, weighing about 3000 lbs. each, for \$100 each;" H. replied, "you will please make for me eighteen retorts, as per memorandum and terms in yours of March 29, and directions given by myself and G." *Held*, that the contract contained no implied warranty that the retorts should be fit for any special purpose, and that no such warranty could be added to it by parol; that the words, "like the one furnished you in February last," should be construed to apply to the quality of workmanship, as well as to the size, shape, and exterior form; and that, under the clause referring to directions by H. and G., a compliance with the requirements of the contract as to the mode of casting and quality might be waived by them, and, if so waived, the plaintiffs would be bound thereby, and in the absence of fraud or bad faith on the part of the defendants, the amount of the knowledge of H. and G. as to the best method of casting was immaterial: *Whitmore vs. South Boston Iron Co.*

A written contract for the manufacture of retorts cannot be affected by proof of a custom that, in the absence of an express agreement, founders shall not be held to warrant their castings against latent defects; and that, in case of apparent defects, they shall be entitled to have castings returned to them within a reasonable time, and to replace them with new ones: *Id.*

The rule of damages in an action for a breach of warranty in articles which are manufactured under an agreement, but which are not furnished for any particular use, is the difference in value between the articles actually furnished, and such as should have been furnished: *Id.*

Criminal Law—Murder, in attempting Abortion—Existence—Pleading—Practice.—In an indictment for murder by poison, it is not necessary

¹ From Charles Allen, Esq., State Reporter.

to allege that the poison was administered by the defendant to the deceased with an intent to kill: *Commonwealth vs. Hersey*.

The court will not order an officer, having charge of witnesses who have been excluded from the court-room until they should severally be called to testify, to prohibit them from reading the newspaper accounts of the evidence in the case: *Id.*

On the trial of an indictment for murder by poison, in which one count alleges that the deceased was pregnant, and was induced to take the poison by assurance of the defendant that it was a medicinal preparation which would produce a miscarriage, evidence of a conversation two or three years before the time of the acts charged, in which the defendant applied to a witness for information upon the subject of procuring abortions, is inadmissible: *Id.*

If a medical witness, on cross-examination, has identified certain medical advertisements as his, they may be read to the jury as a portion of the cross-examination, for the purpose of affecting his credit, but the newspaper in which they are contained cannot be laid before the jury: *Id.*

Evidence that the defendant in an indictment refused to fly, when advised to do so, after suspicions against him were excited, is inadmissible in defence: *Id.*

Action—Liability of Magistrate for Issuing void Execution—Measure of Damages—Evidence in Mitigation.—A magistrate who has rendered judgment for the plaintiff in an action pending before him, and, on request for an execution, has issued one which is invalid on its face, is liable for such damages as are the natural, necessary and proximate consequences of his wrongful act; but not for the costs of levying the execution, or losses to which the plaintiff has been subjected by reason of attempting to enforce it: *Noxon vs. Hill*.

In an action against a magistrate to recover damages for his wrongful act in issuing an execution which was invalid on its face, he may show in mitigation that the condition and circumstances of the judgment debtor were such that nothing could have been collected upon a valid execution: *Id.*

Vendor and Vendee—Note for Purchase Money—When False Representations as Defence.—In an action upon a note given for the price of land, the defendant cannot be allowed to prove, by way of recoupment in damages, that the plaintiff made false representations as to the quality and productiveness of the soil, and the number of acres contained within boundaries which were truly pointed out, by which the defendant was deceived and thereby induced to make the purchase: *Gordon vs. Parmelee*.

COURT OF APPEALS OF NEW YORK.¹

Charitable Use, Validity of—Trustee, Renunciation by, where Presumed—Will, Devise Invalid as Restraining Alienation—Aliens—Effect of Partial Invalidity in Residuary Bequests.—A gift to charity, which is void at law for want of an ascertained beneficiary, will be upheld by the courts of this State, if the thing given is certain, if there is a competent trustee to take the fund and administer it as directed, and if the charity itself be precise and definite: *Beekman vs. Bonsor*.

In other respects charitable trusts are subject to the rules which appertain to trusts in general. The trust must be capable of execution by a judicial decree in affirmance of the gift as the donor made it. The *cy pres* power, as exercised in England in cases of charity, has no existence in the jurisprudence of this State: *Id.*

A charitable gift of a sum which is left uncertain, or which is left to the discretion of executors who have renounced the trust, is void, and the next of kin are entitled to the fund. It seems that such a defect is incurable, even by the *cy pres* power: *Id.*

An executor who renounces his office, the renunciation being followed by many years of total non-interference with the estate, is deemed also to have renounced the trusts conferred by the will, which are personal and discretionary: *Id.*

A gift to executors of money, to be applied in their discretion to the use of societies for the support of indigent and respectable females, without further designation of the beneficiaries, the executors having renounced the trust, cannot be upheld: *Id.*

Where a residuum of personal estate is disposed of by a will, in two parts, and the first disposition is invalid, the sum does not go to the legatees of the other part, but goes to the next of kin: *Id.*

And where the sum devoted to the invalid prior purpose, cannot be ascertained by reason of the failure of that purpose or otherwise, the gift of the remainder is void for uncertainty in the amount: *Id.*

A bequest of a sum of money, to be invested in land, of which the rents and profits are to be applied to certain beneficiaries during fifteen years, the land then to be sold and the proceeds divided amongst the same persons, is void, because it contemplates a trust which would unlawfully suspend the power of alienation: *Id.*

¹ From E. P. Smith, Esq., State Reporter.

And where such a bequest leaves the sum not exceeding a certain limit, in the discretion of executors, and the executors have renounced, the gift cannot be sustained as a pecuniary legacy by disregarding the void directions to convert it into land, and then to re-convert it into money. The amount being unascertained, the bequest wholly fails: *Id.*

A bequest of money, to be laid out in lands for the benefit of aliens, who are to have the possession and enjoyment, contravenes the statute of wills, and is void: *Id.*

Vendor and Vendee—Title to Chattels derived through a Fraud—Husband and Wife—Ambiguous Possession—Purchaser without Notice—Mortgage for Future Advances.—The definition in the 2d Revised Statutes, page 702, section 30, of the term "*felony*" when used in a statute, has not so changed the common law as to prevent a purchaser in good faith and for value, obtaining title to goods, which the original vendee procured by false pretences: *Fussett vs. Smith.*

The case of *Andrew vs. Dieterich* (14 Wend., 36), in this respect overruled.

The possession by a husband of his wife's real estate is to be taken as her possession, so as not to put a purchaser upon inquiry as to the rights of a third person of whom the husband, to cover his own fraud, took a lease unknown to the purchaser: *Id.*

A creditor, who took from his debtor a mortgage declared to be a continuing security for an amount less than the debt, *held*, to have made subsequent advances on the faith of the mortgage, although the original indebtedness was never reduced, but was continually increasing: *Id.*

Municipal Corporation Tax—Payer or Loan Holder no right, as such, to Maintain an Action to Restrain Acts of Corporate Officers.—There is no distinction between a municipal corporation and towns or counties, which enables a taxable inhabitant of the former to maintain an action to restrain or avoid a corporate act not affecting his private interest, as distinct from that of other inhabitants: *Roosevelt vs. Draper.*

Nor can such a suit be maintained by an inhabitant who is also a creditor, holding the public stock of the corporation, to avoid an alienation of its property upon which he has no specific or general lien, and which is not shown to be essential to the security of the corporate creditors: *Id.*

A Governor of the Almshouse is one of the heads of departments, and an officer of the city of New York, prohibited, by chapter 187 of 1849,

section 19, from being interested in the purchase of any real estate belonging to the corporation: *Id.*

Will—Where Widow a Witness against Probate.—An order of the Supreme Court, reversing a Surrogate's decree, admitting a will to probate for error in law, and remitting the proceedings to the Surrogate, is a final determination in the Supreme Court, and is appealable to this court: *Talbot vs. Talbot.*

A widow, cited, but who does not appear or contest the probate of her husband's will, is a competent witness for the contestants, as against the objection that she is a party to the proceeding; and no formal order, dismissing her as a party, or otherwise providing for her examination, is necessary: *Id.*

Where, on the hearing before the Surrogate, there is general evidence of the execution by the husband of a previous will, under which the widow would take the same provision as under the will offered for probate, the validity of the first will is to be assumed in support of the competency of the widow as against the objection of interest: *Id.*

SUPREME COURT OF NEW YORK, GENERAL TERM, SECOND DISTRICT,
May, 1861.¹

Agreement—Statute of Frauds.—The plaintiff was employed by G. to build for one S. a machine for crushing ore; S. having previously arranged with D. & Co., to pay for the same, and the plaintiff looking to D. & Co. for payment, and commencing work upon the machine. Subsequently, D. & Co. refused to pay for the machine, and the plaintiff, on being informed of such refusal, declined proceeding under his contract; whereupon the defendant promised, verbally, that if the plaintiff would go on and complete the machinery, he, the defendant, would pay for it. *Held*, that this was not an agreement to pay the debt of another, nor within the statute of frauds. The first contract was rescinded, and the agreement of the defendant was not collateral, but was an independent and original agreement, and, as such, valid and binding: *Quintard vs. De Wolf.*

Powers and Jurisdiction of Supreme Court—Construction of Wills—Infants—Determination of Claims to Real Estate.—The Supreme Court possesses all the powers and exercises all the functions, both of the Supreme

¹ From Hon. O. L. Barbour, Reporter of the Court.

Court and the former Court of Chancery; but it has not acquired, by the blending of the two tribunals, any right or authority which did not belong to one or the other of their formerly separate jurisdictions: *Onderdonk vs. Mott and Others*.

The action and administration of the Court is perfectly distinct in affording legal or equitable remedies: *Id.*

Where there is no trust, and there is no personal estate in the distribution of which any trust can arise, devisees who claim merely legal estates in the real property, cannot bring a suit in equity to obtain a judicial construction of the will of the testator: *Id.*

If the question to be determined is a purely legal question concerning the nature of the estates created by a will in the lands devised, *it seems* the proper remedy is in court of *law* by an action of *ejectment*: *Id.*

The whole power of the court to order a sale of the lands of infants is derived from the statute. There is no such original jurisdiction in a Court of Equity: *Id.*

If such statutory jurisdiction can be exercised upon bill or complaint, as well as in the ordinary mode by petition, still there is no authority for uniting in such a suit parties who claim a legal title adverse to the infant, and compelling them to litigate that claim and have it passed upon; and there are insuperable objections to such a course: *Id.*

To authorize a proceeding under the statute for the determination of claims to real estate, the claim of the defendant must be adverse to the party in possession: *Id.*

Proceedings cannot be instituted by one having a life estate in premises under a will, against the devisees in remainder. Nor by one who is not in possession: *Id.*

GENERAL TERM, SIXTH DISTRICT, July, 1861.

Revocation of Will.—The intention of a testator to cancel or revoke a clause in his will, however strongly declared, is of no consequence unless it be carried out by some act amounting, in judgment of law, to an actual cancellation or revocation: *Clark vs. Smith*.

A testator having an only son, James W. Smith, devised certain real estate to his "son, James W. Smith." After the execution of the will, he, with a pen, erased from the clauses of the will containing the devise,

the name "James W. Smith," leaving the word "son" uncanceled. *Held*, that neither the will nor the devises to James W. Smith were revoked by the erasures: *Id.*

JENNERAL TERM, SEVENTH DISTRICT, December, 1860, and March, 1861.

Partnership.—The interest of a partner in the partnership property consists in his rateable proportion of the assets after the payment of all the debts of the partnership. In a suit in equity for a settlement of the copartnership affairs, no decree can rightfully be made for the payment by one partner of any sum to another except upon this basis: *Hayes vs. Reese*.

If the partner against whom a decree is obtained upon a final accounting between him and his copartners for the payment by him of an ascertained balance to another, is subsequently compelled by legal process to pay partnership debts to an amount equal to the sum remaining unpaid upon the judgment, this will not entitle him to maintain an action against his former copartners to have the amount of such partnership debts so paid by him ascertained, and for a decree directing that such amount be allowed to him as payment upon the decree: *Id.*

Usury.—When promissory notes of equal amounts are exchanged, one is equal in value to the other, and there is no usury in the transaction; but when either party makes an advantage in the arrangement, over and above seven per cent., then the case is one of usury, if the transaction was designed as, or was connected with, a loan of money: *Thomas vs. Murray et al.*

Money is equal to money in such a transaction, but nothing else is equivalent to money. Where, upon a loan of money, anything else is claimed to be equivalent to money, the lender must show the equality; and if any other thing than money is put upon a borrower in an exchange of notes, in connection with, and as a condition of, a loan of money, the transaction is presumptively usurious in law: *Id.*

The defendant applied to W. for the loan of \$200. W. said he had a note made by M. for \$150, payable in hemlock lumber, and if the defendant would take that note he, W., would let him have the \$200, and take the defendant's note for \$350. The defendant replied that he did not want the M. note, and did not consider it good. Subsequently the defendant told W. that if he would let him have the \$200 that day he would take the M. note, provided W. would guarantee it. This W. agreed to do, and thereupon advanced \$200 in cash to the defendant, and delivered the M

note with a guaranty endorsed, guaranteeing the collection thereof, but without any consideration expressed, and took from the defendant a note for \$556.97, which embraced the \$200 and interest, and the \$150 note and interest. *Held*, that even upon the assumption that W. was liable upon his guaranty of the M. note, and that he could not elect to avoid it, the transaction was usurious upon its face within the case of *Cleveland vs Loder* (7 Paige, 559); but that the guaranty was of no validity for want of a consideration being expressed therein; and that the note for \$150 being turned out by the lender, upon a void agreement of guaranty, as part of the consideration for a loan, the transaction presented a bold case of usury: *Id.*

Held, also, that the fact that the agreement of W. to guarantee the note meant a *valid* guaranty, did not alter the case. That the contract being executed, at the time, must be held to express the agreement between the parties, and to furnish, upon its face, the only evidence of the contract actually made: *Id.*

Held, further, that in an action upon the note given by the defendant to W., the judge should have left it to the jury to say whether it was part and parcel of the bargain, and the intention of the parties that the borrower should take the \$150 note at his own risk in regard to the solvency of the parties thereto: *Id.*

One who makes a contract which the law declares usurious cannot escape the penalty of the offence upon the plea of ignorance of the law, or of the absence of an intention to evade the statute: *Id.*

SUPREME COURT OF MICHIGAN.¹

Gift from Husband to Wife—Evidence.—A husband, acting as the agent of his wife in making settlement of demand in her favor, took a deed of certain lands in satisfaction, which was made to him instead of to her. After her death, the heir at law (who was also the administrator) of the wife, sought in equity an account with respect to these lands, and the husband defended, claiming them as a gift from the wife. *Held*, that the burden of proof was upon the husband to establish the gift; and that the fact that the deed was made to him, in the absence of proof that it was so made by the wife's direction, consent, or knowledge, was no evidence of the gift, and authorized no presumption against the wife's interest: *Wales vs. Newbold*.

¹ From T. W. Cooley, Esq., State Reporter.

Tender on Condition.—Where a tender sufficient in amount to discharge a mechanic's lien upon personal property, was made on condition that the property be delivered up, and the only objection made to the tender was that the amount was insufficient; *held*, that the tender was not vitiated by the condition: *Moynahan vs. Moore*.

Record of an Instrument referring to another Instrument.—Where a writing is recorded as a separate paper, which refers to "the within mortgage," but does not in any way describe or identify the mortgage, the record is no evidence or notice that the writing recorded was indorsed upon any particular mortgage not recorded with it, as that is an extrinsic fact not within the purview of the registry laws: *Bassett vs. Hathaway*.

Common Law Certiorari, what it brings up—Power of the Court upon it.—The return to a common law writ of certiorari should set out the evidence upon which the conviction or other judicial act complained of was founded: *Jackson vs. People*.

The office of a certiorari is not, however, to review questions of fact, but questions of law. And, in examining into the evidence, the appellate court does so, not to determine whether the probabilities preponderate one way or the other, but simply to determine whether the evidence is such that it will justify the finding as a legitimate inference from the facts proved, whether that inference would or would not have been drawn by the appellate tribunal: *Id.*

But the appellate court will review the rulings of law upon the admission or exclusion of evidence, or other rulings in the proceedings having a bearing upon the result: *Id.*

On certiorari to the Recorder's Court of Detroit, to remove the proceedings on conviction for a violation of a city ordinance, the evidence was embodied in the return by the clerk. *Held*, to be properly before the court: *Id.*

Carnal Knowledge and Abuse of a Female Child—Assault—Evidence.—Under an indictment for carnal knowledge and abuse of a female child under ten years of age, the defendant may be convicted of a simple assault, notwithstanding the child consented. The offence charged is rape, and the child has no capacity to consent: *People vs. McDonald*.

Liability of Municipal Corporations for Injuries caused by its Streets being out of repair.—The city of Detroit let to the lowest bidder, as

required by its charter, a contract for the construction of a sewer through one of its public streets. The contract bound the contractor at all times to keep the excavation fenced in, and carefully guarded to prevent accidents, and provided that the contractor should be liable for all damages that might arise from accident occasioned by his neglect. For want of proper guards to the excavation, an injury occurred to a person driving along the street. *Held*, that the city was liable: *City of Detroit vs. Corey*.

SUPREME COURT OF CONNECTICUT.¹

Constitutional Law—Obligation of Contract—Taking Franchise for Public Use, what—Construction of Statute—Ferries.—The Hartford Bridge Company was incorporated in 1808, with power to erect and maintain a toll bridge across the Connecticut River, between Hartford and East Hartford. There were, at this time, two legally established ferries between these towns, and belonging to the towns, located below the proposed site of the bridge, and within a quarter of a mile of it. In 1818, the bridge which had been erected soon after the incorporation of the company, having been greatly damaged by a flood, and requiring to be rebuilt, and the company being unwilling to incur the expense of rebuilding it without the grant of further privileges, the Legislature passed a resolution that, upon the bridge being rebuilt to the acceptance of a committee appointed for the purpose, *the ferries, by law, established between the towns of Hartford and East Hartford, should be discontinued, and said towns should never thereafter be permitted to transport passengers across said river*; with a provision that if the company should neglect to maintain the bridge, the towns might open the ferries. In 1857, the Legislature incorporated the Union Ferry Company, with power to establish a ferry across the Connecticut River, between the towns of Hartford and East Hartford, at a point not less than a mile below the bridge, but made no provision in the charter for compensation to the bridge company for the injury to its franchise. The Ferry Company immediately after established the ferry at a point a mile and a half below the bridge, and were using it for the conveyance of passengers, and a considerable amount of tolls was thereby diverted from the bridge. The line of travel was not the same with that

¹ We are indebted to John Hooker, Esq., the Reporter of the Court, for the points decided in the following cases, which will be reported in the 29th volume of the Connecticut Reports, and for which he will accept our thanks.—*Eds. Am. Law Rep.*

accommodated by the bridge, and the growth of the city of Hartford in that direction had been such as to require the accommodation. On a bill in equity brought by the bridge company, to restrain the ferry company from the use of the ferry, it was *held*, that the resolution of 1818 was to be construed as a contract on the part of the Legislature, only that the then existing ferries should be discontinued, and that the towns should not be allowed to revive them; and that the resolution of 1857, establishing the Union Ferry, was not a violation of the contract, and was not unconstitutional. Storrs, C. J., dissenting: *Hartford Bridge Company vs. Union Ferry Company*.

The same general rules of construction are to be applied to both public and private grants. The intent of the contract is to be ascertained by a fair and rational interpretation of the language used, and, when the intent is ascertained, it is to be carried out against the State as fully as against an individual: *Id.*

Where, however, the language of a public grant will equally admit of two constructions, so that the intent cannot be ascertained, then that construction is to be adopted which is most favorable to the State. This is but the application of the ordinary rule that the language of a contract shall be taken most strongly against the party using it, the language of a public grant being regarded as the language of the party obtaining it: *Id.*

In the present case, the contract of the State that the ferries then existing should be discontinued and never afterwards revived, should be construed as meaning that no ferries substantially the same, and accommodating the same line of travel, should be established: *Id.*

Remarks on the history of legislation in this State on the subject of ferries: *Id.*

Assumpsit—Pleading—Previous Liability as Consideration—Action for Contribution.—Although an existing liability is a good consideration for a promise, whether expressed or implied, to pay money on request, yet it is not sufficient that a declaration on such a promise should merely state that there existed such a liability. It must state the facts on which it arose, and in such a manner that the court can see that there was such a liability: *Bailey vs. Bussing*.

The statement of the liability without the facts on which it arose, is a statement of a mere legal inference, which it is never necessary to allege in pleading, and which, if alleged, is never traversable: *Id.*

A declaration in an action of assumpsit for a contribution, alleged that a joint judgment had been recovered against the plaintiff, the defendant and another, which the plaintiff had been compelled to pay, and that the defendant was in duty bound and liable to pay to the plaintiff one-third of the amount, and being so liable promised, &c., but contained no allegation as to the cause of action upon which the judgment had been rendered. *Held*, that the court could not infer, as a matter of law, that the cause of action was one which imposed upon the defendant the duty to contribute, and therefore that no sufficient consideration for the promise was alleged: *Id.*

Held, also, that the defect of the declaration was not cured by verdict. One judge dissenting: *Id.*

Trespass, Damages in—Illegal Possession—Liquor Law.—In trespass for taking personal property, where the property has been taken without malice and under a claim of right, and the controversy relates only to the title, the rule of damages is the value of the property at the time of the taking, and interest from that time to the time of the judgment: *Oviatt vs. Pond.*

Where, in such a case, the plaintiff claimed that, by the taking of the property, he had been broken up in his business, and the judge charged the jury that the defendant must make the plaintiff good for all the actual damage sustained by him at the defendant's hands, resulting directly and naturally from the injury, a new trial was granted on motion of the defendant: *Id.*

Under the 27th section of the statute with regard to intemperance, which provides that "no action shall be maintained for the recovery or possession of spirituous liquors, or the value thereof, except in cases where persons owning or possessing such liquors, with lawful intent, may have been illegally deprived of the same," there can be no recovery in an action of trespass for the value of liquors taken, where the same were kept for illegal sale: *Id.*

And this rule was applied where the liquors of the plaintiff had been attached and taken away by the defendant, an officer, as the property of another party against whom he held a writ of attachment: *Id.*

Liquors kept for sale contrary to law, are regarded by the law as having no lawful value, or value for lawful purposes: *Id.*

This provision of the statute is constitutional and valid: *Id.*

NOTICES OF NEW BOOKS.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT AND THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY. By ANDREW DUTCHER, Reporter. Vol. IV. Trenton: Published by the Reporter, 1861.

This volume contains cases decided at the November Term, 1859, and the June Term, 1860, and it fully sustains the long-established reputation of that ancient State for thoroughness and research in the decisions of its highest judicial tribunals. We have been gratified to find so large a proportion of the cases of so important a character. For it is unfortunately true, that by far the largest number of cases which find their way into the reports in this country are too insignificant, both in importance and amount, to command that serious examination or consideration, either by court or counsel, which is requisite to give the decision the character of authoritative precedent. And the wonder often is how they happen to have been so worse handled than they were.

In equity, certainly, and, we believe, the same holds true in law also, the cases which come before the English Courts in London and Westminster, equal, if they do not exceed in real importance, both as to the question involved and the value of property affected, all, or nearly all, those which are decided by all the Superior Courts in the whole United States, including the National as well as the State Courts. And when it is further considered, at what immense disadvantages as to time and opportunity for the use of books, the majority of these cases are examined and determined, the wonder is just and natural which we have already expressed.

But New Jersey is one of the oldest and most favored of the States, both in regard to general learning in the profession and ample facilities for the use of books, always in the vicinity if not immediately at hand.

The volume now before us, while it presents the usual number of questions of the nature of proceedings by certiorari, mandamus, and other sessions matters, which are not of much general interest out of the particular State, has also a considerable number of cases of marked general interest. We could not particularize all of this class, and it might, therefore, seem invidious to name any. But we venture to name a few which have seemed to us worthy of special commendation. The case of *Edwards vs. Derrickson*, pp. 39-79, occupies a large space in a very careful examination of several questions in regard to the mechanics' lien and the mode of enforcing it. The *State vs. The City of Elizabeth*, pp.

103-112, contains a very careful examination of the rights of corporations, to apply their property which is exempted from taxation in general terms, to purposes of speculation or direct profit, aside from the purposes contemplated by their charters, and of the effect of such use in regard to the exemption from taxation, where the profits are ultimately applied to the objects specified in the charter; and the conclusion is reached upon sound views, we believe, that such property is liable to taxation.

Ross vs. Adams is deserving of notice as an instance of the application of common sense and natural reason to the construction of an act of the legislature, when an adherence to strict technical rules would have led the court quite one side of the purpose of the legislature.

Winfield vs. The City of Hudson, pp. 255-265, is an interesting case where Chief Justice Green discusses, with his usual clearness and ability, the negotiability of city stocks under the statute of that State.

Boylon vs. Meeker, pp. 274-478, is a will case, involving questions of great interest, always, to the parties, such as want of capacity, fraud, and undue influence, together with forgery, and the proper limits of the admissibility of the declarations of the testator, upon the several issues growing out of these different exceptions to the instrument, which are discussed with unusual thoroughness and ability by several of the judges. But, with all due submission and deference to the learned judges, it does seem to us that the facts in the case are quite too extensively debated here to claim any just place in a volume of Law Reports. The Reporter could not well lay the opinions of the judges one side. But, it is certain, somebody should have taken the responsibility of cutting out, at the very least, one hundred pages of the report of this valuable and interesting case. It would then have been needlessly prolix.

There are many more valuable cases, any one of which is worth more to the profession than the cost of the volume. If there is any general fault in the volume, it is that the cases are reported too much at length. There is one great excellency, which is becoming rare of late, the examination and discussion of the important cases by more than one of the judges.

The work of the reporter is done with great accuracy and neatness and the paper and type are altogether unexceptionable. We have great pleasure in recommending it to the profession as a valuable addition to the long list of American Reports.

I. F. R.

REPORTS OF CASES IN LAW AND EQUITY DETERMINED IN THE SUPREME COURT OF THE STATE OF IOWA. By THOS. F. WITHROW, Reporter. Vol. III., being Vol. XI. of the Series. Des Moines: Mills & Brothers, 1861.

This third volume of Mr. Withrow's Reports fully vindicates the good opinion we have already expressed of the former ones. In many respects this volume is deserving of imitation in quarters where we are accustomed to look for models rather than copyists. The cases are more briefly reported than what has been usual of late with the American Reports, and, consequently, contains a larger number of cases than is usual. This we regard as an advance in the right direction; and, as it tends towards the days of Johnson and other model reporters, we might almost say, at the hazard of a solecism or even a paradox, it is an improvement upon the late reports, because it is an advance backwards.

There are, no doubt, some advantages in having a point discussed at length, and all the cases brought into notice; and it is well to do this with the leading cases. But it cannot be done with all the cases, and the sooner the courts begin to act upon this view the better for the profession. We notice, in the 1 Allen's Reports, that the Massachusetts Court are setting an example in that direction. This volume of Iowa Reports is another indorsement of the course. We trust it will find other followers.

The substance of the head note being embodied in a single word or two, in small capitals or italics at the beginning, is a great aid, and every facility of that kind to save time and labor, is a merit in a law book. We trust this feature will be found worthy of general adoption by all the reporters in the country, as it has long been in England.

We have no space to enumerate the leading cases in this volume. There are many of this character which seem to have been decided upon the soundest principles without much examination of the authorities. Post-nuptial contracts as to creditors, general assignments, action of libel against grand jurors, the conclusiveness of officers' returns, are all of this character.

There are some decisions wherein the court review the decisions of inferior tribunals upon motions for continuance, petitions for new trial, removing defaults and non-suits, which are commonly regarded as matters of mere discretion, and not revisable in courts of error, and one case allowing set-off of damages in actions of tort, even in slander, all which has a kind of *outré* sound in the older States; and unless controlled by the code of that State, as some of them profess to be, these decisions are certainly not a little anomalous.

We should say the same of the decisions in this volume, holding that one convicted of manslaughter on an indictment for murder, but who on appeal obtained a new trial upon his own motion, could not, therefore, be tried for murder but only for manslaughter. Notwithstanding some conflict in the decisions, the proposition seems to us to carry a sufficient refutation in its own innate absurdity. When the party asking a new trial proposes to limit the prosecutor, not by the former *trial* which is to be *renewed*, but by the former conviction, which has been set aside upon his own motion, this would be a new trial of the *conviction*, but not of *the case*. There was, undoubtedly, so long as the verdict stood, an implied acquittal of the charge of murder. But when set aside, that portion of the verdict was no more effective than the conviction of manslaughter. Since both the charge and the verdict were entire, there is no plausibility in saying that the verdict was set aside as to its direct effect in finding a conviction of manslaughter, but still remained in full as to the *implication* resulting therefrom of an acquittal of murder. If the verdict is set aside it must be, in *solido*, both for its *direct effect* and the *resulting implications*.

But these are unimportant matters, and we very cordially commend the volume to the favorable notice of the profession throughout the country.

I. F. R.

A TREATISE ON THE LEGAL AND EQUITABLE RIGHTS OF MARRIED WOMEN; as well in respect to their Property and Persons, as to their Children. With an APPENDIX of the Recent American Statutes, and the Decisions under them. By WILLIAM H. CORD, Esq., Counsellor at Law. Philadelphia: KAY & BROTHER, 19 South Sixth Street, Law Booksellers, Publishers and Importers, 1861.

Few subjects require more careful professional consideration, than the legal and equitable rights of married women. A good book on this branch of law is a necessity with the bar everywhere, and such a book Mr. Cord has furnished us. The collection of the various State statutes, at the end of the volume, is exceedingly valuable and useful. In the body of the book, the author seems to have stated fully and accurately the doctrines of the common law and equity, as well as noticed the more important peculiarities of the various State reforms.

We recommend this work to the practising lawyer, as an essential aid in disentangling the embarrassing questions which so often arise in the law of "married women."

A. I. F.

THE

AMERICAN LAW REGISTER.

FEBRUARY, 1862.

THE RELATIONS OF RAILWAYS AND HIGHWAYS— STREET RAILWAYS.

I. THE RIGHTS OF RAILWAYS AS TO THE LAND OWNERS. HOW FAR THEY MAY DEMAND COMPENSATION WHEN RAILWAYS OCCUPY THE HIGHWAYS.

1. Some of the earlier American cases allowed such compensation.
2. A railway was for a long time regarded as only an "improved highway;" and no additional compensation given to the land owner.
3. That doctrine abandoned. Now held that the railway is an additional servitude and the owner of the soil entitled to additional compensation.
4. This was always the English rule. One cannot there tunnel the highway without additional compensation to the owner of the soil.

II. THE LAW HAS BEEN HELD DIFFERENTLY IN REGARD TO STREETS IN THE CITIES.

1. As to street railways, not operated by steam, it has been held the landowner is not entitled to additional compensation for any use they may make of the streets or highways, either in city or country.
2. Railway companies generally held to require only the consent of the municipal authority for locating in the street. Rule questioned in some cases.
3. There is difficulty in saying what is the true principle.

III. DECISIONS AND INTIMATIONS IN REGARD TO THE ULTIMATE RIGHTS AND DUTIES OF STREET RAILWAYS.

1. Such railways need not pay any compensation to land owners.
2. They are never to be regarded as a nuisance or purpresture.
3. There has been manifested great public interest in the establishment of street railways.

- 4 It may fairly be calculated that some abatement of the enthusiasm may occur hereafter.
5. It is therefore the policy, as well as the duty of the proprietors of such interests, to cultivate kindly relations, both with the public and the municipal authorities.

IV. THE RELATIVE RIGHTS AND DUTIES OF THE PROPRIETORS OF STREET RAILWAYS AND THE MUNICIPAL AUTHORITIES, IN REGARD TO THE MAINTENANCE OF THE SECURITY OF THE HIGHWAYS FOR PUBLIC TRAVEL.

1. The municipal authorities have all the powers and duties of the municipalities themselves.
2. The primary responsibility for the safe condition of highways rests upon the municipalities.
- 3 The railways are directly responsible to persons injured by their negligence.
4. And the towns are not responsible when they have no right to interfere, or where the maintenance of the highway rests solely upon the railways, as is sometimes the case in regard to steam railways.
5. And where towns are made responsible for the default of railways, they are entitled to demand indemnity of the railways, and this extends to costs and expenses.
6. And where the injury did not accrue for more than six years after the default of the company, they were still held liable to indemnify the town.
7. But the railway is not responsible unless in default, either in laying or maintaining their track.
8. A condition in the location of a street railway that it shall be completed in a given time, will not render void the location, upon non-performance, unless judicially declared.
9. The reserved power of vacating the location by the municipal authorities, is only limited by good faith and reasonable discretion.
10. It is both the interest and duty of street railways to cultivate in themselves a sense of dependence upon the good will of the municipal authorities, and of consequent forbearance towards all other modes of public travel.
11. This is the only condition upon which the grant of such large privileges, for such long terms, could possibly be endured.
12. The indispensable necessity of some summary tribunal, in every State, where such railways exist, for the speedy determination of questions arising in regard to the relative rights and duties of the railways, the towns, and the traveller.

We have selected this familiar subject for the present article partly because it was familiar. What is familiar, and of daily use and occurrence, stands some fair chance for being made useful to our readers and patrons, if otherwise valuable and important, while one which is abstruse and recondite, and of rare occurrence, is far less likely to prove so. And the profession have no time and

little disposition to listen to disquisitions, the chief purpose of which is, either to educate the author or to exhibit his skill in dialectics, or in law. The relation of highways to railways, and the rights growing out of these relations, has, first and last, led to more litigation than almost any other subject connected with the LAW OF RAILWAYS.

I. We have here to consider the rights of railways in regard to the land owners, or whether the owner of the fee of land, which has already been taken for the use of a public highway, is entitled to additional compensation when a railway is constructed over the same land. The decisions upon this point have been exceedingly conflicting. While it has always seemed to us extremely clear, as matter of principle, that in such case the railway is an additional servitude upon the land, and therefore justly entitles the owner of the fee to additional compensation; the current of authority, especially in this country, at one time certainly, seemed to be setting, almost without obstruction or protest, entirely in the opposite direction.

1. Some of the earlier cases did, indeed, require additional compensation to the land owner in such cases. The *Trustees of the Presbyterian Society in Waterloo vs. The Auburn and Rochester Railway*, 3 Hill (N. Y.) R. 567; *Fletcher vs. Auburn and Syracuse Railway*, 25 Wendell R. 462; other cases of that date took a similar view: Redfield on Railw. 176, and Notes.

2. But it was very soon discovered by some courts, as they supposed, that a railway was only an *improved highway*, and this was thought to deprive the land owner of all claim for additional compensation. The course of argument, by which this result was reached, was very natural and plausible. It was well settled that the land owner was not entitled to additional compensation in consequence of any alterations, which the municipal authorities might elect to make in the construction of the highway, as such, whatever detriment he might sustain thereby. This was one of the contingencies, coming fairly within the contemplation of the purpose for which the right of way was originally taken. And even

when the change in the highway was of a character which could not have been reasonably anticipated, either on account of some unexpected change in the necessities of travel, or because the public authority might be regarded as having acted capriciously in the particular matter, it was nevertheless among the exigencies of possible advancement, or of official discretion, or the want of it, to which every loyal man is bound to submit, and which he ought to prepare himself to do with grace, and without additional compensation. This question has been repeatedly decided by the English courts. *Governor & Co. of Plate Manufacturers vs. Meredith*, 4 T. R. 724; *Sutton vs. Clark*, 6 Taunt. 29; *Boulton vs. Crotcher*, 2 B. & C. 703; *King vs. Payham*, 8 B. & C. 355. Similar principles have been adopted in this country: *Henry vs. The Pittsburg and Allegheny Bridge Co.*, 8 W. & Serg. R. 85. In other cases cited in *Hatch vs. Vermont Central Railway Co.*, 25 Vt. R. 49, and note. It seemed very natural hence to conclude, that the legislature might convert a highway into a railway, since that was only a different mode of intercommunication: *Williams vs. N. Y. Central R.*, 18 Barb. R. 222, 246.

3. But the argument has finally been proved unsound. A railway is indeed an improved highway, but it is more. And the land was originally taken for no such purpose. The use is vastly more onerous and detrimental to the owner of the fee, which may fairly be presumed to belong to the land adjoining. And there is not the same probability of abandonment, as in the case of an ordinary highway. The case of *Williams vs. New York Central Railway*, *supra*, was accordingly reversed in the Court of Appeals, 16 New York Court of Appeals R. 97, and upon a full review of all the cases, English and American, it was fully determined, that both upon principle and authority, the land owner is entitled to additional compensation for the new burden upon his soil. The same rule is now adopted by the following cases: *Imlay vs. The Union Branch Railway*, 26 Conn. R. 249; *Gardiner vs. Boston and Worcester Railway*, 9 Cush. R. 1; *Springfield vs. Connecticut River Railway*, 4 Cush. R. 63; *Tate vs. Ohio and Mississippi Railway*, 7 Ind. R. 479; *Protzman vs. Indianapolis and*

Cincinnati Railway, 9 Ind. R. 467; *Evansville & C. Railway vs. Dick*, 9 Ind. R. 433. Many other American cases will be found in Redfield on Railw. § 16 and Notes.

4. The doctrine of the English courts is elaborately discussed in the late case of *The Marquis of Salisbury vs. The Great Northern Railw. Co.*, 5 Jur. N. T. 70, S. C., 5 C. B. (N. S.) 174. The court here say: "The soil of a public highway is presumably vested in the owner of the adjacent land *ad medium filum via*." They further say there is nothing in the General Turnpike Acts to alter this presumption, or to vest the soil of that description of roads in the trustees of the roads. *Davidson vs. Gill*, 1 East R. 69. And in *Ramsden vs. The Manchester South Junction & Atl. Railway*, 1 Exch. R. 723, it was expressly determined that a railway company has no right to tunnel even under a highway, without making previous compensation to the land owner. See also *Thompson vs. East Somerset Railway*, 29 Law Times, 7. So that we think it safe to affirm that notwithstanding the large number of American cases in the opposite direction, the tide is so completely turned, that it will not relapse.

II. The law has been held somewhat different in regard to the streets of cities, and whether the attempted distinction between such streets and common highways will ultimately prevail, it is, perhaps, not time to determine with confidence.

1. In regard to street railways, not operated by steam power, the decisions have been uniform, we believe, that the land owners are not entitled to any additional compensation: *Brooklyn Central and Jamaica Railway vs. Brooklyn City Railway*, 33 Barb. R. 420. And the same rule was applied where a common highway was converted into a turnpike road, and an incorporated company allowed to take toll on the same: *Wright vs. Carter*, 3 Dutcher R. 76. But in *Williams vs. The Natural Bridge Plank Road Company*, 21 Mo. R. 580, it was decided that the grant of such a road along a highway did not preclude the claim of the owner of the soil for compensation for the additional purchase. This case is not, however, in consonance with the general course of decision upon the subject, at the present time.

2. It seems generally to have been considered that the municipal authorities of a city, or large town, have such an exclusive control over the streets, that a railway company duly chartered by the legislature for the purpose of constructing a railway, extending within the limits of such town or city, will require no other warrant for the construction of their road, except that of the consent of the municipal authorities, as to the particular location; and that the adjoining land owners, or abutters, have no such interest in the land covered by streets, as will entitle them to compensation. This was so decided at an early day, soon after railways began to be constructed in the country: *Philadelphia and Trenton Railway*, 6 Wharton R. 25; *Lexington and Ohio Railway vs. Applegate*, 8 Dana R. 289; *Hamilton vs. New York and Harlem Railway*, 9 Paige, 171; *Hentz vs. Long Island Railway*, 13 Barb. 646; *Chapman vs. Albany and Schenectady Railway*, 10 Barb. 360; *Redfield on Railways*, 162, and cases cited, § 76, pl. 6, n. 6. But even this doctrine seems to have been somewhat questioned in the case of *Nicholson vs. New York and New Haven Railway*, 22 Conn. R. 74, where it was held that the company, in laying their road through the City of New Haven, in which they found it necessary to carry one of the streets over the railway, upon a bridge with large embankments at both ends, the plaintiff owning the land abutting, and no compensation being offered him, became liable to the plaintiff in an action of trespass for any appreciable incidental damages occasioned thereby to him. It was also here held, that the company having proceeded, under the authority of the legislature, were *primâ facie* not liable as trespassers, but that when they caused any appreciable damage to the land owners along the line of the street they occupied by their road, they were liable in this form of action.

The court in this last case, Hinman, J., assume the distinct ground, that the railway, by laying their track upon the plaintiff's land, which was before only subject to the servitude of the highway or street, would become liable for "such entry" upon the land. "In all such cases," said the learned judge, "the subjecting the plaintiff's property to an additional servitude, is an

infringement of his right to it, and is, therefore, an injury and damage to him. It would be a taking of the property of the plaintiff, without first making compensation," thus treating the fee of the land covered by the street as still being in the adjoining owner.

3. From what we have said, it will be apparent the cases are not as yet entirely harmonious, in regard to the use of the streets of our large towns and cities, for the bed of steam railway tracks; and it is not easy now to determine precisely where the true principle must eventually bring the courts. There does not seem to be any such difference between the streets of a city and large towns like New Haven, which is also, in fact, a city, as to justify any different rule, as applicable to the two cases. And the same may be said of the imperceptible shades by which the streets of cities and towns grow into mere country highways, as they recede in that direction. It would be difficult upon any of the highways leading into our cities to determine the precise point at which a steam railway would cease to be liable to make compensation to the adjoining land owners for occupying the highway by their track.

III. If we were to conjecture the final result of the cases upon this subject, we should say :

1. That street railways are so nearly the same thing as the ordinary use of a highway, that no additional compensation will ever be required to be paid to the owners of the soil, from the mere fact of occupying the street in that way, whether it be in the city or country. The motive power is the same, the noise and dust not increased, and the only appreciable difference consists in bringing the travel to a defined line. This is not attended with any inconvenience to the land owner. The grade of the street is not required to be changed, and the same is true where these lines of travel are carried along the line of highways in the country, as is now the case for long distances in the vicinity of some of the large towns. We cannot therefore conjecture any sufficient ground for subjecting the proprietors of such street railways to the burden of making additional compensation to the land owners; unless from the future use of steam power upon street railways, they should cause a similar annoyance

to that which is now caused by steam railways. And in that case, and in every instance where such street railways cause special damages to the adjoining land owners, the redress should be left to the statutory remedy given in most of the states, for consequential injury caused by railway companies. We cannot suppose that there can be any difference as to the rights of the owners of the soil, whether the railway is operated by a corporation or a natural person, or that it is, of necessity, mainly a monopoly. The fact that ordinary travellers are not allowed to conform their carriages to the tracks of the company, so as thereby to convert it to their own use, can make no essential difference with the owners of the soil: *Brooklyn Central Railway vs. Brooklyn City Railway*, 32 Barb. R. 358. This cannot be done even by consent of the municipal authority: *Ib.*

2. It has been repeatedly decided that a street railway, which is erected under a grant from the legislature, and with the concurrence of the municipal authorities, is not to be regarded as a nuisance or purpresture: *Milbau vs. Sharp*, 15 Barb. R. 193; *Plant vs. Long Island Railway*, 10 Id. 26; *Chapman vs. Albany and Schenectady Railway*, Id. 360; *Adams vs. S. and W. Railway*, 11 Id. 414; *Hodgkinson vs. Long Island Railway*, 4 Edw. Ch. R. 411. Some of the cases, in deciding that a street railway is not a nuisance of such a character, that it will be enjoined at the suit of the adjoining land owners, place stress upon the fact, that the railway is so constructed and used as not to obstruct or impair the public right of way: *Hamilton vs. New York and Harlem Railway*, 9 Paige R. 171; *Drake vs. Hudson River Railway*, 7 Barb. R. 508. See also Willard's Eq. Ju. 402, 406.

3. We think it may be fairly regarded as evidence of very surprising interest in the public feeling, in having street railways maintained, and of condescension towards them, on the part of the public generally, that no more remonstrance has yet been made in regard to the kind and degree of obstruction which they unavoidably do produce in the public streets in cities, and especially in the greatest thoroughfares, where they are most used, and would, by consequence, be most likely to be built, if the municipal autho-

cities will allow it. In some portions of the City of New York, we think, and probably in other cities, the street railways are excluded from the most crowded thoroughfares, and confined to streets where they may be operated in lines parallel to the main thoroughfares, and thus afford substantially the same accommodation to public travel, with less serious embarrassment to the other modes of travel. But this is not the usual course in the cities, so far as we have observed. More commonly the tracks of these street railways are allowed to be laid precisely where there is the most of other travel, and where, by consequence, they must inevitably cause a most uncomfortable amount of embarrassment, often, to others. And in some thronged streets, not wide in themselves, the street railways are allowed to lay double tracks, which, by the frequent passing and repassing of cars, almost wholly obstruct, at times, the free passage of teams and carriages, for periods of greater or less duration.

4. It has, therefore, always seemed probable to us, that at no remote period, after the feverish gratification consequent upon having such a luxurious and inexpensive mode of street travel, so generally introduced into the principal streets of our large cities, shall have so far subsided as to allow of what has been very appropriately called "the sober second thought of the people," to find expression, there will not be the same enthusiastic concurrence in the necessity of having such a monopoly of transportation in so uncomfortable a mode, so far as other travel is concerned, so generally maintained. It has seemed amazing to us, that no more clamor against so serious an obstruction of the thoroughfares in the larger cities, has hitherto been heard. We should, of course, rejoice to see the continuance of the same quiet acquiescence in the partial evils caused by these street railways, for more universal good. But we scarcely dare expect it.

5. We think it fair, therefore, to admonish the proprietors of such interests, to be prepared for a serious reaction, in regard to them, in the public mind, and not to count too confidently upon the continuance of this unbroken, unclouded sunshine of public favor.

We know many able jurists and wise statesmen, somewhat of the

old school, be sure, who regard them with no favor; and if not prepared to denounce them as altogether unmitigated evils, yet feel that they are by no means exempt from the charge of themselves causing serious public grievance, if not even deserving of a more offensive name. We are certainly not disposed to sound any note of alarm against so important a public interest. What we have said has been altogether by way of friendly caution, and to induce, if possible, reasonable circumspection on the part of such companies to maintain the most entire submission to, and patient endurance of, those little inconveniences which will be liable always to occur in the streets, feeling that they are already sufficiently protected from any intentional obstruction and embarrassment, both by the statutes of the states and the decisions of the courts.

IV. We deem it proper, also, to give some brief outlines of the relative rights and duties of the street railway companies and the municipal authorities of the town or city through which they pass, in regard to the maintenance of the public highways in safe condition for public travel.

1. The selectmen of the several towns, and the mayor and aldermen of the cities, have all the powers and duties of the towns and cities which they represent, and are bound to maintain the rights and duties of their respective superiors, and to vindicate the public rights committed to their care and control: *City of Boston vs. Boston and Prov. Railw. Co.*, 6 Cush. R. 424.

2. The primary responsibility in regard to the safe condition of highways and streets, so far as the public is concerned, rests upon the towns and cities, notwithstanding their insecurity may have been caused by the negligence or misconduct of the railway company; and which might be at the time exercising a legal right in an improper manner, and in regard to which the municipalities had no direct control over them: *Currier vs. Lowell*, 16 Pick. R. 170; *Willard vs. Newbury*, 22 Vt. R. 458; *Batty vs. Duxbury*, 24 Vt. R. 155; *Buffalo vs. Holloway*, 14 Barb. R. 101.

3. It is not intended to intimate here that the railway companies, who are first in fault, are not also liable to the persons injured by such default on their part. There can be no question they are

liable to an action, directly, by the party injured. This has been often decided by the English courts: *Drew vs. New Riv. Co.*, 6 Car. & P. 754; *Manley vs. The St. Helen's Canal and Railw. Co.* 2 Hurst. & Norm. 840.

4. And in regard to those defects in highways where the municipal authorities could not interfere to remedy them, without an unauthorized interference with the track of the railway company, the towns are not liable at all for any injury which may occur in consequence, the companies being alone responsible: *Davis vs. Leominster*, 1 Allen, 182; *Jones vs. Waltham*, 4 Cush. R. 299. Nor are the towns responsible where the injury is occasioned by an illegal act of the railway company. The party affected will have to look exclusively to the company in such cases, unless the act of the company had before rendered the highway unsafe, and this had become known to the town: *Vinel vs. Dorchester*, 7 Gray R. 421. So, also, when a railway company, by occupying the highway, finds it needful to erect and maintain a bridge for the accommodation of the highway, the towns are not held responsible for any defects in such bridge: *Sawyer vs. Northfield*, 7 Cush. R. 490; see, also, Redfield on Railways, 391, *et seq.*, § 171. But in such case the towns may compel the railway companies to keep such bridge in repair, by writ of mandamus, and may recover of them any expenses incurred by keeping them in repair: *State vs. Gorham*, 37 Maine R. 451.

5. And in all cases where towns or cities are made responsible to persons suffering injury in consequence of defects in the streets or highways, through the fault of railway companies primarily, such railway companies are liable to indemnify the towns or city, for all damages or costs thereby suffered: *Lowell vs. Boston and Lowell Railw.*, 23 Pick. R. 24; *Newbury vs. Conn. and Pass. Railw. Co.*, 26 Vt. 751, 752. And in such cases costs will include counsel fees and other necessary expenses: *Duxbury vs. Vt. Central Railw. Co.*, 26 Vt. R. 751, 752, 753; *Hayden vs. Cabot*, 17 Mass. R. 169, where Parker, C. J., says: "If the surety pays voluntarily, he shall be reimbursed; if he is compelled by suit to pay, he shall also be indemnified for his costs and expenses."

6. And even where the injury did not accrue for more than six years after the unlawful act or neglect of the company, it was held that they were still responsible to the town to indemnify them; and that it would not exonerate the company guilty of the neglect, that they had subsequently leased their road to another company, who were operating it at the time the injury occurred. *Hamden vs. N. H. & Northampton Co. and N. Y. & N. H. Railway Co.*, 27 Conn. R. 158.

7. But when the railway company have a right to lay their rails in the streets of a city or town, they are not responsible for any injury resulting therefrom to others, unless they were in fault, either in laying them down or keeping them safe. In such case the injury is considered accidental. *Mazetti vs. N. Y. & Harlem Railway Co.*, 3 E. D. Smith R. 98.

8. And where a street railway company were authorized to construct their line and operate their road through the streets of a city, and the municipal authorities have assented to the location of the company's road upon a given route on certain conditions, one of which was, that it be completed in a given period, it was held that the municipal authorities had no power to vacate the location for failure of the company to complete their road in the time prescribed; that such condition was not to be regarded as precedent, but subsequent, and that nothing short of a judicial determination would operate to divest the interests of the company. *Brooklyn Central Railway vs. Brooklyn City Railway*, 32 Barb. R. 358.

9. But in those charters of street railways, where there is reserved to the municipal authorities a power of vacating the location of street railways, in their discretion they may undoubtedly exercise such power, upon the ground that the original location was injudiciously made, the track being placed in the middle of the street, when it should, for the accommodation of the public travel, have been placed upon the margin of the street, or vice versa. We say this upon the ground that such a reservation evidently looks mainly to the placing such street railways under the absolute control of the municipal authorities; and that such a control, to be of any practical benefit to the public, as a defence against the assumption of

unjust interference, on the part of street railway companies with the other public travel, must be absolute and unlimited, except by the conditions of good faith and reasonable discretion. One great purpose of such a reserved power is to enable the municipal authorities to correct mistakes in former action by the result of enlarged experience; and the companies must be content to enjoy such liberal privileges upon the tenure of such uncertain conditions, even.

10. It seems to be an indispensable pre-requisite to allowing the location of horse power railways along the streets and highways, that they should be held to very strict accountability to the public authorities; for unless this is done, there will arise, in all probability, such frequent collision between the rights and interests of the general public and this railway monopoly of a portion of the public street or highway, as speedily to beget inconceivable feuds and conflicts, quite inconsistent with that quiet good order which is indispensable to comfort, or tolerable success in threading the numerous thoroughfares of our populous cities. And the very apprehension on the part of the companies, or their employees, that they had acquired interests or rights entirely independent of the public control, would be liable to beget a spirit of positiveness and want of accommodation which, if not the source of annoyance and discomfort to themselves, could hardly fail to become so to others. The only practicable mode of maintaining the proper spirit of yielding accommodation in these street railways, and their employees, will be found to consist in their cultivating in themselves the feeling that they are allowed such large indulgence in the exclusive use of the public street, from year to year, purely by the favor of the public, and not as matter of vested right. They should not allow themselves to feel that they have acquired anything more than a temporary indulgence, since no public functionary has any power to give them anything like a permanent easement in the public street for carrying forward such a monopoly of travel throughout the indefinite future. If they had, or could acquire any such easement, it would constitute an additional servitude upon the soil, and entitle the owner of the fee to additional compensation.

11. And in saying the companies and their employees should cultivate such a feeling of dependence upon public favor, and the concession of the public authorities, we mean, of course, that street railways cannot be admitted on any other condition without becoming an intolerable grievance, not to say nuisance. It is, therefore, for their best interest to put themselves in the proper spirit for perpetual duration, and studiously to cultivate and to maintain such a spirit; and if they should, in any spirit of defiance and mistaken zeal for supposed exclusive privileges, which have no existence except in their own misapprehensions, come to seriously disturb the public comfort and convenience along the crowded streets and thoroughfares of our cities, it would unquestionably become the duty of the municipal authorities, by bringing their unfounded pretensions to some judicial determination, to teach them the proper spirit of forbearance and reserve towards other modes of travel having equal rights with their own in every portion of the street, so far as their necessities might demand. These questions are readily disposed of in courts of equity, and in applications for mandamus and other similar orders.

12. We have occupied so much space already upon this subject, that we can only refer at present to one more topic, which seems to us of the greatest consequence, both to the proprietors of street railways and to the public interests liable to be affected by them. We mean the creation in every state where such companies exist, and the same may be true, in a degree, of steam railways, of a public tribunal (commissioners, or a court of inquiry) for the summary determination of all questions of conflicting claims between railway companies and the municipal authority, in regard either to the use of the streets or highways, the repairs of those portions near the line of the railway track, any obstructions caused by the railway to other travel, or any obstructions caused by other travel to the operations of the railway, or obstructions caused by the repairs or reconstruction of the highway, either to the bed of the railway or its operation, or any similar questions arising between the railways and the municipal authorities. Such a board, always in session, and of easy access, would be of infinite advantage to these

interests in more ways than we have time to name in detail, and might save some litigation and much heart-burning and uneasiness to all parties concerned. We have noticed in some of the states, that while all such questions affecting steam railways are referred to the county commissioners, the provision does not include street railways. We think it far more important that such a provision should embrace the latter than the former, inasmuch as street railways occupy the highways throughout their whole extent, while steam railways are only allowed to intersect them at such points as are indispensable.

I. F. R.

In the District Court of the United States for the District of Wisconsin.—In Equity.

ASAHEL EMIGH vs. SELAH CHAMBERLAIN.

An assignment of the revenues of a railroad, and the use of the rolling stock, by the Company, to a preferred creditor, is not a transfer of corporate entity or property. And the use, by the assignee, of cars which have attached patented brakes, does not render him liable to account for infringement upon the patent right, when the exclusive use of the brakes had been licensed to the Company by the patentee. The assignee used the brakes as an agent of the Company, and not as a purchaser; and his use of them, in the name of the Company, was exclusive, in the meaning of the license.

The opinion of the Court was delivered by

MILLER, J.—The complainant, as the assignee for the State of Wisconsin, of a patent right to Francis A. Stevens for a combination and arrangement of levers, link-rods, and shoes or rubbers, whereby each wheel of both trucks of a car on a railway is retarded with uniform force when the brake is put in operation, brings this bill against defendant for operating, or causing to be operated, the La Crosse and Milwaukee Railroad in this State, by the use of cars with the improved brakes. The defendant sets up a deed from the patentee, Francis A. Stevens, given previous to complainant's assignment, to the said railroad company, whereby, in consideration of six hundred dollars to him paid in full satisfaction, he licensed and conveyed to the company the full and exclusive right and liberty of using the said improvement on any or all their own cars, over any

part of their road. Defendant further shows that, by an instrument of writing, called by him a lease or mortgage, the company granted to him, for an indefinite time, its entire railroad and road route, together with right of way and depot grounds, and all buildings and property of every description, including the rolling stock. He to operate the road and receive all the revenues, and out of them defray all expenses of operating the road, purchasing additional rolling stock, paying interest of liens, and the residue to apply towards a claim of his own against the company. And when his claim should be paid, either by the company or out of the revenues of the road, the property to revert to the company. The company was using the patented improvement upon the cars that passed to Chamberlain, and which he continued to use. Chamberlain, after operating the road for some time, under the deed of the company, was superseded by an order of this court appointing a receiver.

The assignment to complainant excepts the license to the company. Whether Stevens would be the proper person to claim damages is not made a question by the pleadings. Can the complainant require defendant to account to him, is the only question submitted.

The deed of Stevens to the company licenses and conveys the full and exclusive right of using the improvement on their own cars. There is no power granted the company to rest the right in any person, by conveyance or otherwise. It is simply a license.

In order to test the right set up by defendant, we must bear in mind that the railroad company is incorporated by a law of the State, and to such Stevens made the license, and as such the company made the assignment to defendant. The duties imposed upon the company by its charter, were not fulfilled by the construction of the road. Important franchises were granted the company to enable it to provide the facilities to communication and intercourse required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency was provided, as a remuneration to the community for the legislative grant. The corporation cannot absolve itself from the performance of its obligation without the consent of the

legislature. Defendant could only operate the road under and subordinate to the charter of the company; and not he but the company was liable for the performance of all the corporate duties to the public. He only could perform those duties in the name of the company. The franchises of the company were not, and could not be vested in him. He was nominally substituted for the company in the active use of the road and property.

The corporation, as a creature of the law, must use the franchises granted it by means of officers of its own appointment, either directly or indirectly. *Railroad Co. vs. Winans*, 17 Howard, 30—39, and cases cited.

It is contended on the part of complainant, that defendant was a mortgagee in possession, and as such, he held under a title, in the nature of a conveyance from the company. This court has uniformly considered the rolling stock of a railroad company as a fixture not liable to levy and sale apart from the realty. And we have placed liens by mortgage of those companies on the same footing as of individuals. In this State the mortgagor is the owner of the premises, until a sale is made in pursuance of a decree of court. The note and mortgage are choses in action. *Sheldon and Wife vs. Sill*, 8 Howard, 441. The mortgagor may put the mortgagee in possession of the mortgaged premises until the debt is paid by receipt of rents and issues; but the mortgagee would not hold adversely to, but under the mortgagor.

Technically, the deed under which defendant held possession of the road, was not a mortgage. The defeasance does not make it a mortgage; as, without it, the company would have the equitable right to regain possession upon discharging its debts to defendant, and to require him to account. The deed is an assignment of the revenues of the road to a preferred creditor, with the privilege of using the road and property of the company for the mutual interest of the debtor and creditor. The rolling stock and the road, at the date of the assignment to defendant, were subject to mortgages, whose accruing interest he became obliged to pay out of the revenues of the road. If he replenished the stock, he did so from the same source. The company being insolvent, devised the scheme

of placing their property in the hands of defendant, for the purpose of completing the road to La Crosse, of paying the annual interest of liens, and of satisfying his claim.

Although this court pronounced the arrangement fraudulent and void as to creditors, yet it was valid between the parties, and this suit can be defended under it. The deed to defendant is not a conveyance of the property. The rolling stock was the property of the company in defendant's hands. It might as well be claimed that the receiver appointed by this court should account for the use of the patented improvement, which, I presume, will not be pretended. The receiver holds the property of the company for the benefit of its creditors. Defendant did so with consent of the company, for the same purpose. In both cases, the company is the owner of the cars with the patented improvement attached. The company did not divest itself, by its deed to defendant, of its corporate entity or property.

Defendant is to be viewed in the light of an agent and trustee. He was a mere substitute for the company, and his use of the cars was the same as that of the company, and exclusive as to third persons or other interests in the meaning of the license.

The bill will be dismissed.

In the Supreme Court of Connecticut.—October Term, 1861.¹

THE BRIDGEPORT BANK vs. THE NEW YORK AND NEW HAVEN RAILROAD COMPANY.

R. & G. L. Schuyler being the owners of one hundred and sixty shares in the defendant's company, of which R. Schuyler was the Register and Transfer Agent, the latter in 1849 delivered to the plaintiffs, as collateral security for a debt due by him, certificates for ninety of those shares, with a blank power. No

¹ We are indebted to the kindness of Mr. Justice Ellsworth for this important and valuable opinion, for which we desire to express our grateful acknowledgments. We hope, at some future time, to discuss the questions involved, and others germane to them, more in detail than our present leisure or space will allow.—*Eds. Am. Law Reg.*

application for a transfer on the books of the company, as required by the charter, was made until 1854, when it was discovered that R. S. had been guilty of a fraudulent over issue of the stock of the company to his firm, but there was no evidence that any of this spurious stock had passed out of the hands of the firm before the delivery of the genuine certificates to the plaintiffs. The company subsequently refused to allow the transfer of the latter. *Held,*

1. *Burden of proof.*—It is incumbent upon the defendants to show, if such be the fact, that these certificates do not represent the genuine stock of the company, that being a fact more exclusively in their power to prove.
2. *Plaintiffs' title.*—The plaintiffs are to be regarded as the first and only equitable purchasers and owners of ninety of the one hundred and sixty shares of genuine stock held by Schuyler.
3. *Plaintiffs' title not lost by delay.*—The *bona fide* holders of such certificates had a right to rely upon them, as securing to the owners the shares which they represented, against all transfer to other parties.
4. *Notice to the Company.*—The *knowledge* of Schuyler that these certificates were held by *bona fide* purchasers, for value, was notice to the company, while he acted as their transfer agent in registering the transfers to subsequent parties, and thus affected them, constructively, with the fraud of their agent, and thereby avoided the effect of such transfers as between the plaintiffs and the company, and rendered them liable to make good the plaintiffs' loss thereby sustained.
5. *Semble.*—It is by no means certain that the transfers registered are to be regarded as having operated upon the plaintiffs' shares.
6. *Blank transfers.*—Blank powers of attorney, for transferring stock, although under seal, may be filled up at the convenience of the transferee, and thus operate as of their date.
7. *Lex loci.*—Such being the settled law of the State of New York where this instrument was intended to take effect, will remove all question as to its validity, even if we admit that the law of the place where it was executed is otherwise.

The plaintiffs, in 1849, took from Robert Schuyler two certificates of stock in the defendants' company, one for fifty and the other for forty shares, as collateral security for the balance due on account against him. The bank held these certificates, without transfers, until 1854, when the Schuyler frauds were discovered. They then demanded of the company a transfer of the shares, which was refused, and this suit was brought. At the time the bank took those certificates, Schuyler owned one hundred and sixty shares of the genuine stock of the company; but in the meantime he had issued, as register and transfer agent, an immense number of spurious shares, which he had transferred in a similar manner to other

parties, and these parties had obtained the transfer of these genuine shares into their own names on the books of the company, before any demand made by the plaintiffs, or any formal notice to the company of their holding such certificates with transfers signed in blank. The other facts in the case sufficiently appear in the opinion of the Court, which was delivered by

ELLSWORTH, J.—Several questions of the gravest character have been raised in this case, and have been argued with great learning and ability. Most of them we do not find it necessary to decide, as there is one which, in our opinion, is essentially decisive of the case. Thus, we need not determine whether, if the stock in question had been found to be spurious, there could be a recovery for the refusal of the defendants to allow a transfer of it, nor whether, if the transfer had been made, it would in that case have been of any benefit to the plaintiffs; nor need we determine whether the form of action adopted, is the proper one for trying the question of the liability of the defendants, for the frauds of their transfer agent in issuing fraudulent certificates of stock, nor whether such liability exists. We place our decision upon the ground that the defendants, upon whom the burden of proof upon this point clearly rests, do not show that the certificates held by the plaintiffs do not represent genuine stock, as, in the absence of proof to the contrary, they must certainly be taken as doing. The burden of proof upon this point, we say, is upon the defendants. Their agent, appointed for the express duty of issuing certificates to the holders of stock, issued these certificates in the usual form, and for the purposes prescribed by their rules, and it is to be presumed, certainly in favor of these plaintiffs, who had become *bona fide* holders of the certificates upon the credit which their official character gave them, that R. & G. L. Schuyler had, at the time, good stock to which they would apply, which presumption must stand until the defendants show, as they can do, if such was the fact, that there was no stock standing in their names which could be represented by the certificates. When we say that the defendants could show how the actual fact was, we mean merely that they had the power to show it, and do not intend to express an opinion upon the question, controverted in the case, whether

they would be allowed to show it, against the certificate of their own officer.

The defendants have not shown that, at the time when the plaintiffs took their certificates, there was not genuine stock held by the Schuylers sufficient to answer to them. On the contrary, it appears that at that time the Schuylers held one hundred and sixty shares of good stock, which stood in their names, and which they could have legally transferred to the plaintiffs or any other purchaser. If there were nothing more in the case, it would be clear that the defendants ought to have allowed the ninety shares, covered by the certificates held by the plaintiffs, to be transferred to them.

But here the defendants come in and show that, before the plaintiffs received their certificates, Robert Schuyler, their transfer agent, and one of the firm of R. & G. L. Schuyler, had issued to the firm, in his official capacity, certificates of stock to the amount of four hundred and ninety shares, beyond the one hundred and sixty shares of good stock held by the firm, and thus they say that the genuine stock had been all exhausted before the plaintiffs' certificates were issued. It is, however, not found, and the judge expressly states that it was his intention not to find, that these certificates for the four hundred and ninety shares had ever passed out of the hands of the Schuylers. It cannot be presumed, in the absence of all evidence on the subject, that those certificates had been transferred to other parties; much less can it be presumed that they had been so transferred upon a valuable consideration, and to *bona fide* holders. So far as we can see, therefore, and as upon the finding, we are to presume, the plaintiffs, when they received their certificates, were the first and only equitable purchasers and owners of ninety out of the one hundred and sixty shares, held by the Schuylers.

The fact, which is found, and which has been pressed upon us by the counsel for the defendants, as one of great importance, that the greater part of these certificates were afterwards, in the years 1849, 1850, and 1851, surrendered to the railroad company by the Schuylers, and cancelled, and new certificates issued in their place to other parties, can not, we think, affect the case. We regard the

right of the plaintiffs to the stock represented by their certificates, as one already vested, and which, under the by-laws of the company, which forbade the transfer of any stock except upon the surrender of the certificate representing it, could not be defeated so long as they held the certificates. The plaintiffs, relying upon the by-laws of the company, and the provisions of the certificates themselves, had retained and carefully preserved the certificates as the appropriate and conclusive evidence of their right to the stock. The defendants cannot set aside their own by-laws at their pleasure. The defendants, however, say, that the plaintiffs acquired only an equitable title to this stock, and that, though such a title will be recognised and protected within reasonable limits, yet, that a duty devolved upon the plaintiffs themselves in the matter, which they have neglected, and by which neglect they have lost their right to the stock. This duty, they say, was either to procure a transfer of the stock within a reasonable time, (which they say that four years clearly was not,) or else to give timely notice to the railroad company that the stock had been equitably assigned to them. They say that it is like the case of the grantee of real estate, who fails to get his deed recorded until after a *bona fide* purchaser has taken a later conveyance of the land, or of the vendee of personal property, who does not take a delivery of it, and loses his title to it as against a *bona fide* purchaser, who afterwards finds it in the possession of the vendor, and buys and takes a delivery of it. They say that, admitting the stock to be genuine, so that the equitable title acquired from the Schuylers was a good one, and entitled them to a transfer of ninety shares of genuine stock, if they had within a reasonable time demanded such transfer, or given notice of their equitable title, yet that the Schuylers retained the legal power to sell this same stock to other parties, who would acquire a legal and therefore a preferable title if they should first get a transfer of it, and that it was the duty of the defendants to allow a transfer of whatever good stock they found standing in the name of the Schuylers, upon the presentation and surrender of a certificate for the same, so long as they had no notice of any claim of other parties upon the stock; and that whatever claim the plaintiffs have for

damages upon any body, is not a claim upon them, but, as in the case supposed of the vendee, who had been defrauded by a later sale of the property by the vendor to another party, is a claim upon the Schuylers, their vendors, who have defrauded them; they, the defendants, being, as they say, merely custodians of the property, holding it subject to the order of the Schuylers, who were the owners of it, and having no other duty to perform than to see that the party calling for it had a proper order from the owners. We cannot assent to this claim of the defendants. We cannot regard them as mere custodians of the property, with no other duty with regard to it than that which has been suggested. By the very form of their certificates, specially prescribed, and specially adapted to the purpose of their negotiation, and which were issued by their own agent, and by their by-law, providing that no stock represented by such certificate should be transferred until the certificate itself was surrendered, they had assumed a duty far more extensive than that which they now assert. The *bona fide* holders of such certificates had a right to rely upon the certificate, under the circumstances, as securing to them the stock which they represented, *against all transfers to other parties*.

But there is a further, and we think decisive reason, why the defendants cannot avail themselves of this transfer of the stock to other parties. These very transfers to other parties were a fraud upon the plaintiffs. This fraud is wholly distinct from the fraud of their transfer agent in issuing spurious certificates. The agent who issued the certificates might be a different person entirely from the agent who superintended the transfers, and it will make the point clearer to suppose him to have been so. Now their transfer agent knew, when he allowed these transfers to other parties, that the stock had already been sold to a prior purchaser, who held a legal certificate for it, and that it was a fraud on that party to allow the stock to be transferred to other parties, so long as the certificate was not surrendered. Their transfer agent, in allowing these transfers, was *acting precisely within the scope of his official power, and his knowledge and fraud are, therefore, the knowledge and fraud of the defendants themselves*. We are supposing, in this view of the

case, that the very stock in question has been transferred to other parties. This is the claim of the defendants, and we therefore, for the sake of the argument, so regard the fact. If the same stock was in fact transferred to other parties, then their transfer agent knew that he was committing a fraud on the plaintiffs in allowing the transfer, for he knew that the certificate representing that stock had not been surrendered, but was still outstanding in the hands of a *bona fide* purchaser. If, however, this precise stock was not transferred to other parties, but those transfers are to be regarded as operating on other stock, or as having no operation at all, then this stock is still left untransferred, and the defendants are clearly liable for having refused to allow a transfer of it to the plaintiffs. We are by no means sure that this latter supposition may not be a correct one. The subsequent transfers do not purport to embrace these shares, while Schuyler was constantly creating new shares, (or what purported to be such), and transferring and re-transferring them, and issuing certificates for them, at his pleasure. These transfers and certificates may, perhaps, be regarded as having embraced only other stock, and as leaving the stock in question untransferred. We merely suggest this supposition, as it is not necessary to the general view of the case which we take.

But if the defendants are right in claiming that they are protected in transfers made to other parties, where they have no notice of equitable transfers to prior purchasers, yet this principle very clearly could not avail them here. The plaintiffs, it is said, should have given them notice of their equitable title. But how should they have given such notice? Why, only to that officer of the company whose duties related to the transfer of their stock; that is, to their transfer agent, Robert Schuyler, himself. But Robert Schuyler already had full knowledge of the fact, for he was the very party who sold the stock to the plaintiffs; and though a distinction may be made between the knowledge which he had as an individual, in which capacity he was acting in selling the stock, and the official knowledge which he would have acquired by a formal notice giver to him as transfer agent of the company, yet, practically, this distinction is very unimportant. When afterwards he

came to allow the transfer of this stock to other parties, he was acting officially, and he then had knowledge, and acted with full knowledge, that the plaintiffs had acquired an equitable title to the stock. Notice of such an equitable title is never required to be formally given. Actual knowledge, however acquired, is enough to affect an individual, and we entertain no doubt that this knowledge of Robert Schuyler is to be regarded as the knowledge of their transfer agent, and as the knowledge of the defendants. It is to be observed, too, that Robert Schuyler was not merely the transfer agent of the defendants, but was, at the same time, the president of the company and one of its directors.

Two questions remain to be considered. One is, whether the plaintiffs have proved a sufficient demand upon the defendants for a transfer of the stock, to enable them to sustain their suit. That a demand was necessary is admitted by the plaintiffs. The first demand made by the plaintiffs' cashier, at the office of the company in New York, on the morning of July 5th, 1854, the day after the great fraud of Schuyler had been discovered, was not, in our opinion, sufficient. It appears that there was no transfer agent in the office, and that the company had appointed none in the place of Schuyler, who had just fled from the country, and the confusion incident to the developments then being made, fully justified the defendants in temporarily closing their transfer books, and in deferring the appointment of a new transfer agent. Such a course was necessary to the safety of the company, and was absolutely required by the condition of its affairs. As there was no absolute refusal to allow a transfer at some future time, we are inclined to the opinion that it was not such a refusal as to give the plaintiffs a right of action. The second demand, however, made by Mr. Buckingham in behalf of the plaintiffs, shortly before the commencement of the present suit, we think was sufficient. It was made at a proper time and in a proper form, and it is expressly found that Mr. Buckingham, in making it, was acting as the agent and attorney of the plaintiffs. It is said by the defendants that Mr. Buckingham could not make a legal demand, because he had entered into a champertous, and therefore illegal and void contract with the plaintiffs for the prose-

cution of this claim, and that this demand was made under that contract, as a part of the service which he was to render in the prosecution of the claim, and for the purpose of bringing the suit. But we regard the demand as unaffected by the illegality of the contract for the prosecution of the suit. It preceded the institution of the suit, and was not, properly, any part of it. He was none the less acting as the agent of the plaintiffs, and the plaintiffs have since ratified his act, if the authority given was defective before, by abandoning the champertous contract, assuming the benefit of the demand made by him, and proceeding with the suit on their own account. The question is purely one of authority, and we are satisfied that the authority was sufficient. It is a point of very little importance to these defendants, only at the most rendering another demand and suit necessary, and is too merely technical to deserve very much consideration. The defendants deny all right of the plaintiffs to a transfer of the stock, and upon any demand whatever, would have refused to allow the transfer, and we should not, except upon a positive necessity, send the plaintiffs out of court to make another useless demand.

The remaining question is, whether the blank power of attorney given by R. & G. L. Schuyler to the plaintiffs, under seal, at the time they took the certificates, was sufficient, and whether the plaintiffs could afterwards fill it up and use it as a valid power, taking effect at the time it bears date. We think that it was sufficient, and that they could fill it up and use it, although it was under seal. We are satisfied that it has been the practice of this railroad company from the first, as it is of many other corporations, to their own great convenience and that of the public, to allow blank powers of attorney to be filled up as circumstances should require; and such a practice may give a construction to, and may even qualify, and vary, a by-law of a corporation. But without going so far as this, we feel no hesitation in holding the power to be sufficient in blank, and we are satisfied that in this country the rule of law is, that a blank power of attorney, although under seal, may be filled up in conformity with the agreement of the parties, and when so filled up, takes effect as of its date. The

rule we suppose to be otherwise in England, where the old principle of the common law on the subject is more rigorously applied, and where the policy of the stamp system influences their decisions. The cases in this country in which the view taken by us is supported, are numerous, and may be found in *Redfield on Railways*, sec. 35; and Mr. Redfield, himself a jurist of much learning and of long experience on the bench, gives it as his opinion, that the doctrine of the American cases is decidedly preferable to that of the English. Nor can any reason be assigned, which is founded in good sense, and is not entirely technical, why a blank, in an instrument under seal, may not be filled up by the party receiving it after it is executed, as well as any other contract in writing, where the parties have so agreed at the time. In either case, the contract, when the blank has been filled, expresses the exact agreement of the parties, and nothing but an extreme technical view, derived from the ancient law of England, can justify the making of any distinction between them. Such a technical distinction is little suited to the usages and necessities of modern commerce, for credit, among merchants, and facilities for making it available in their transactions, are a most important element in its character, however unimportant they may have been in a state of society where commerce was little known, where seals were a substitute for signatures, and where lords and vassals, alike, could not write their own names.

We do not find it necessary to go out of the record to learn what course this railroad company has always pursued with regard to the transfers of their stock, under powers of attorney. It is found that the certificates held by the plaintiffs are in the form prescribed by the by-laws of the company, and are such as the defendants have uniformly sanctioned and approved. These certificates, as they came from the defendants' hands, contained, on the same piece of paper, and immediately under the certificate, a blank assignment of the stock, and a blank power of attorney for its transfer. The defendants must therefore be held to have intended and agreed, that whoever should present the certificate so issued, with the assignment and power of attorney executed in blank, should be entitled to fill up the blanks with his own name,

and to have a transfer of the stock made to himself on the books of the company. The certificate, accompanied by the assignment and power of attorney thus executed, in blank, has perhaps a species of negotiability, although of a peculiar character, but one necessary to the public convenience, and to which it is no objection that the instrument has a seal.

But we feel relieved from embarrassment in holding this power sufficient, by the fact that the transfer was to be made under it in the State of New York, where, it is admitted by the defendants' counsel, the law is settled by the highest judicial authority in favor of the validity of a blank power of attorney. As the power was to be executed there, it is certainly sufficient that it was a valid one under the law prevailing there; and a citizen from Connecticut, who has taken his certificate here, has certainly the same rights under it in New York that a citizen of that State would have under a certificate taken there.

We will only remark, in conclusion, that the tendency of judicial decisions and of legislation in this country, is to do away, so far as can be done without too violent a departure from ancient rules, with distinctions in the character and effect of written instruments founded upon the mystical power of a seal. The legislature of this State has, repeatedly, by confirmatory acts, enacted that instruments purporting to be specialties, but from which the seal had been omitted, should be as good and valid as if sealed, and has further enacted that the letters *L. S.* or the letter *S.* or some equivalent, in the place where a seal is ordinarily affixed, shall be deemed to be a seal. Similar enactments we have no doubt are common in other States. In these circumstances we feel much more inclined to relax the strictness of the common law with regard to sealed instruments, than to adhere to it.

We have taken no notice of any security held by the plaintiffs, as affecting the amount of damages to be recovered, because no allusion was made to it in the argument. Independently of that, we advise the superior court to render judgment for the plaintiffs for the value of the stock in question at the time of the last demand, which is agreed to be sixty dollars per share, with interest from that date.

In the Supreme Court of Indiana, February, 1862.

JOHN S. SCOBY vs. ISRAEL T. GIBSON.

The Indiana statute of 1861, which provides that in all cases of sales by the sheriff on execution, after its passage, the sheriff shall not give the purchaser a deed for, and possession of the property sold, but only a certificate entitling him to a deed and possession in one year from the sale, if the property is not redeemed in the manner therein provided, is unconstitutional, so far as it supplies to sales on judgments upon contracts existing at, and before its passage.

Appeal from the Decatur Circuit Court.

The opinion of the Court was delivered by

PERKINS, J.—The only question in this case is, whether the redemption law of 1861 (Acts of 1861, p. 79), is to be held applicable to sales on judgments upon contracts existing at, and before its passage. The act provides that in all cases of sales by the sheriff, &c., on execution, &c., after its passage, the sheriff shall not give the purchaser a deed for, and possession of, the property sold, but only a certificate entitling him to a deed and possession in one year from the sale, if the property is not redeemed.

In legal effect, what is the operation of this statute?

It is to prohibit, for one year, the absolute sale of property for the purpose of collecting a debt due. In place of such sale, it authorizes the sheriff to make a contract for the absolute sale of the property after the lapse of one year's time, unless such contract shall be defeated by the performance of a specified condition, namely, the return of the purchase-money paid, with interest, by the expiration of said year. It authorizes, in other words, the sheriff, in legal effect, to mortgage the debtor's land for one year, to any one who will advance the amount required by law upon its appraised value, the mortgage to become absolute and free from equity of redemption at the end of a year, if the money advanced is not refunded, with interest.

What is the influence of such a statute upon the collection of debts? Its tendency is to delay. It embarrasses the collection, because it deprives the creditor of the right which the law, at the

date of his contract, gave him, of selling the absolute fee of the debtor's real estate.

And the question is, if held to operate upon existing contracts, will the act conflict with that clause of Section 10, Art. 1, of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts? What constitutes such a law?

A few years ago, the Legislature passed a law forbidding the sheriff to sell the debtor's property unless the half of the appraised value was bid for it. Before that time property had sold for what it would bring. The appraisement law was held not to operate on existing contracts, and why? Not because it forbade the sale of property for their enforcement—it did not do that; but because it deprived the sheriff of the absolute power to sell the fee, at all events. It left him but the conditional power to sell, the power of selling if he could get a certain price, not otherwise. It tended to embarrass, and thereby to prevent, the sale, and thus to delay the collection of the debt.

So, too, awhile ago, an additional stay of execution was given upon judgments, by an act of the Legislature. This act was held inoperative as to existing contracts, and why? Not because it cancelled obligations, but because it delayed their collection by the process of the law. This was the natural, necessary, and intended effect of both of the above mentioned statutes, and it is, also, of the redemption law. If the decisions upon the operation of the first two named laws were right, and we are bound by them, then, beyond doubt, the redemption law in question must be held inoperative upon existing contracts. See the cases collected in Gavin & Hord's edition of R. S., Vol. 1, p. 10.

It is said that where a purchaser bids off the property, and pays the money under the present law, he has no right to object to the redemption, as he buys in face of the law; but it is a maxim that every man is bound to know the law, and act accordingly. Hence, the man who buys does so knowing that the law will not, and cannot operate to deprive him of his deed and title; and he must be taken to make his bid in the light of, and influenced by

such knowledge. And further, the law must be uniform in its operation alike upon all.

Again, it is urged that the Legislature has a right to change legal remedies, that it is only the obligation of contracts that cannot be impaired, and it is claimed the redemption law affects the remedy only.

It is freely admitted that the State, for convenience, may change legal remedies, may vary the times of holding courts, shift jurisdiction from one to another, change forms of action, of pleadings and of process, &c., and such legislation may, incidentally, delay somewhat the collection of given debts, but such is not the purpose of this legislation. And while its validity is admitted, it may also be asserted that the Legislature cannot, under the guise of legislating upon the remedy, intentionally, in effect, impair the obligation of contracts; and it may be further laid down, that any legislation, professedly directed to the remedy, which deprives a party of one substantially as efficient as that existing at the making of the contract, does impair the obligation of the contract. Ind. Digest, p. 271, sec. 55. In *Grantly's Lessee vs. Ewing*, 8 How. (U. S.) p. 707, Judge Catron, in delivering the opinion of the court, said:

"This court held, in *Bronson vs. Kenzie*, 1 How. 319, that the right, and a remedy substantially in accordance with the right, were equally parts of the contract, secured by the laws of the State where it was made." See, also, 1 Blackf., by Peele and Davis, p. 220, note; also, 4 Cal. Rep. 127; 5 Id. 401; 1 Manning (Mich.) R. 869.

It may, perhaps, be questioned whether the redemption law in question is properly classed as legislation touching the remedy. It does not operate upon terms of court, upon pleading or practice in obtaining judgment, nor upon process upon judgment. But, however classed, it restricts and curtails the right of the judgment creditor in relation to subjecting the property of the debtor to execution for the payment of given debts. It may not diminish the fund of the debtor applicable to the payment of his debts, nor did the appraisement law, nor the stay law; but it limits, curtails,

and materially embarrasses the right of the creditor in given cases, in subjecting the entire amount of the debtor's property subject to execution, to the payment of the debt in suit. *Curran vs. Arkansas*, 15 How. (U. S.) p. 304.

This court judicially knows, and it must decide the question as one of law, upon its judicial knowledge, that the right to sell at once the entire, absolute fee simple in land, and give the purchaser possession, is worth more, will be more likely to realize the amount of money due on a particular judgment, than the restricted right of selling a conditional interest in such land; and that, hence, the taking away of such absolute right may tend to defeat, in given cases, the collection of debts due. A purchaser will give more for an absolute title than a conditional one; and few moneyed men will be found to buy conditional titles as mere investments, which may be defeated by simply refunding them their money, with ten per cent., when a much higher rate may be obtained on the most select security.

But suppose the act in question is to be regarded as directed to the remedy. Still, as we have seen, an act thus directed may impair the obligation of contracts. It is very doubtful whether those cases, decided upon the general rule of international law, that the *lex loci* governs as to interpretation and effect to be given to the terms of a contract, and the *lex fori* as to the remedy upon it, are safe guides to rely upon in determining the force to be accorded to the constitutional provision quoted. These express constitutional restrictions upon the legislative power, are peculiar to American governments, and must be interpreted in accordance with the spirit and purpose of their adoption. Stay and relief laws, enacted by various States before the adoption of the Federal Constitution, were, in part at least, the evil which they were designed to prevent the repetition of. The learned Chancellor De Saussure, of South Carolina, who lived in the times mentioned, and who went upon the equity bench in 1808, in a note to *Glaze vs. Drayton*, Vol. 1, p. 109, of his reports, a case decided in 1784, says "The Legislature, in consideration of the distressed state of the country after the war, (Revolutionary War,) had passed an act

preventing the immediate recovery of debts, and fixing certain periods for the payment of debts far beyond the period fixed by the contract of the parties. These interferences with private contracts became very common with most of the State Legislatures, even after the distress arising from the war had ceased in a great degree. They produced distrust and irritation throughout the community, to such an extent that new troubles were apprehended, and nothing contributed more to prepare the public mind for giving up a portion of the State sovereignty, and adopting an efficient national government, than these abuses of power by the State Legislature." See, also, on this point, Rawle on the Constitution, and Sergeant's Constitutional Law.

We have been controlled, in coming to our conclusion, by the decisions bearing upon the question latest made by the Supreme Court of the United States. We may most safely, we think, presume that that court will follow, and not depart from, those decisions. Should such be the case, it would be detrimental to the public should this court decide the redemption law operative upon existing contracts, thus leaving debtors to suffer their lands to be sold upon the faith of a right to redeem, which the Supreme Court might take away; while, should this court decide against the redemption, it will put debtors on their guard to take care of their property; and should the Supreme Court afterwards decide in favor of redemption, the decision of this court will not have worked harm to any great extent.

The judgment is reversed, cause remanded, &c.

In the Supreme Court of Pennsylvania, 1862.

ROBERT FORSYTH vs. DEBORAH WELLS.

1. Trover will lie to recover the value of coal dug by the owner of land, through a mistake of boundaries, out of adjoining land.
2. The measure of damages in such action, there being no wrongful purpose, will be the fair value of the coal in place, as if on a purchase of the coal field from the plaintiff, and not its value when mined.

This was an action of trover. The parties to the suit were owners of adjoining coal tracts. The defendant had, some years before, opened a mine or drift in his own land, near the dividing line, and had at last worked through into the plaintiff's land, as it was alleged, and dug out her coal. The action was brought for the conversion of this coal.

That there was, in fact, any encroachment, was denied by the defendant, and it was further contended on his behalf, at the trial of the case, that whatever other remedy the plaintiff might have, this was not the proper form of action in which to try a question of title or boundary. The judge below, however, charged the jury in substance, that if the defendant was not at the time of the taking of the coal in actual adverse possession of the *locus in quo*, under claim of title, but merely worked into his neighbor's land through a mistake of the true boundary line, trover would lie, and that he would be obliged to account therein for the value of the coal.

On the question of damages, it was urged by the defendant, that if he was liable at all in this form of action, it would only be for the value of the coal *in the ground*, before he had expended any labor in preparing it for market. On the other hand, it was claimed by the plaintiff, and the judge so charged, that the measure of damages was the value of the coal when dug, or what was called *knocked down*, in the bank; the difference between these two modes of estimation being more than one in eight.

The jury having found for the plaintiff in the sum of \$775, this writ of error was taken.

For the *plaintiff in error*, it was argued by Kaine, that the real matter in dispute was as to the position of a boundary line, and this was a question of title which could not be decided in a transitory action like that of trover: *Brown vs. Caldwell*, 10 Serg. & R. 118; *Mather vs. Trinity Church*, 3 Serg. & R. 509; *Powell vs. Smith*, 5 Watts, 127.

But admitting that the coal taken really did belong to the plaintiff below, the measure of damages is only what it would have been worth on the purchase from him of a *coal leave*, that is, of the right

to dig and mine it out of her land: *Bank of Montgomery vs. Reese*, 2 Casey, 146; *Hughes vs. Stevens*, 12 Casey, 322. According to that standard, her loss by the defendant's mistake did not amount to \$50, whereas under the ruling of the Court she recovered nearly \$800, which included the cost and expense of preparing the bank and digging the coal. Even if the coal is to be considered as a personal chattel for which trover would lie, surely the defendant cannot be obliged to pay for the labor which he himself has expended in reducing it into that condition.

For the *defendant in error* it was argued that if trover would lie at all for coal severed from the realty, the measure of damages must be the value of the coal when brought into that state or condition which makes it personalty, and the subject of a conversion. Such was the decision in *Martin vs. Porter*, 8 M. & W. 351, and in *Wild vs. Hott*, 9 M. & W. 672; and the case of *Baker vs. Wheeler*, 8 Wend. 505, as to trees manufactured into boards, is still stronger. And see the opinion of Chief Justice Gibson in *Wright vs. Grier*, 9 Watts, 172.

That trover will lie for a chattel severed from the land cannot now be denied: *Hargrave's Co. Litt.* 218, b., n. 2; *Wright vs. Grier*, ut supra; *Harlan vs. Harlan*, 15 Penn. St. 507; *Ferrand vs. Thompson*, 5 B. & Ald. 826; *Moers vs. Wait*, 3 Wend. 104.

There was no real dispute as to the true boundary line; but if there had been, it was immaterial. Where a question of title arises incidentally, it may be tried in a transitory action. The true rule, as deduced from our cases, seems to be, that where there is an actual, visible, and notorious adverse possession, a party shall not be allowed to try his title in a transitory action, but must first establish his right by ejectment, and then proceed for mesne profits; but where there is no such possession, but a mere solitary trespass, or any number of trespasses, the owner may bring a personal transitory action, and if the defendant disputes the title, it must necessarily be tried in that action: *Mather vs. Trinity Church*, ut supra; *Elliott vs. Powell*, 10 Watts, 453; *Harlan vs. Harlan*, ut supra; *Wright vs. Grier*, ut supra.

The opinion of the Court was delivered by

LOWRIE, C. J.—We are to assume that it was by mistake that the defendant below went beyond his line in mining his coal, and mined and carried away some of the plaintiff's coal, and it is fully settled, that for this trover lies: 8 S. & R. 515; 9 Watts, 172; 8 Barr, 294; 9 Id. 343; 9 Casey, 251.

What, then, is the measure of damages? The plaintiff insists that because the action is allowed for the coal as personal property, that is, after it had been mined, or severed from the realty, therefore, by necessary logical sequence, she is entitled to the value of the coal as it lay in the pit after it had been mined, and so it was decided below. It is apparent that this transfers to the plaintiff all the defendant's labor in mining the coal, and thus gives her more than compensation for the injury done.

Yet we admit the accuracy of the conclusion, if we may properly base our reasoning on the form, rather than on the principle or purpose of the remedy. But this we may not do, and especially we may not sacrifice the principle to the very form by which we are seeking its enforcement. Principles can never be rectified without forms, and are often inevitably embarrassed by unfitting ones; but still the fact, that the form is for the sake of the principle, and not the principle for the form, requires that the form shall serve, not rule the principle, and must adapt itself to its office.

Just compensation in special classes of cases is the principle of the action of trover, and a little study will show that it is no unyielding form, but adapts itself to a great variety of circumstances. In its original purpose and in strict form, it is an action for personal property lost by one and found by another, and converted to his own use. But it is not thus restricted in practice; for it is continually applied to every form of wrongful conversion, and of taking and conversion, and affords a compensation, not only for the value of the goods, but also for outrage and malice in the taking and detention of them: 6 Serg. & R. 426; 12 Id. 93; 8 Watts, 833.

Thus form yields to purpose for the sake of completeness of remedy. Even the action of replevin adapts itself thus: 1 Jones.

381, and so does trespass: 7 Casey, 456. In very strict form, trespass is the proper remedy for a wrongful taking of personal property, and for cutting timber, or quarrying stone, or digging coal on another's land, and carrying it away; and yet the trespass may be waived, and trover maintained, without giving up any claim for any outrage or violence in the act of taking: 3 Barr, 13. It is quite apparent, therefore, that this form of action is not so uniformly rigid in its administration as to force upon us any given or arbitrary measure of compensation. It is simply a form of reaching a just compensation for the goods lost. Where there is no fraud or violence, or malice, this is enough: 11 Casey, 28.

Where the taking and conversion are one act, or one continual series of acts, trespass is the more obvious and proper remedy, but the law allows the waiver of the taking, so that the party may sue in trover; and this is often convenient. Sometimes it is even necessary, because the plaintiff, with full proof of the conversion, may fail to prove the taking by the defendant. But when the law does allow this departure from strict form, it is not in order to enable the plaintiff, by his own choice of actions, to increase his recovery beyond just compensation, but only to give a more convenient form of recovering that much.

Our case raises a question of taking by mere mistake, because of the uncertainty of boundaries, and we must confine ourselves to this. The many conflicting opinions on the measure of damages in cases of wilful wrong, and especially the very learned and thoughtful opinions in the case of *Silsbury vs. McCoon*, 4 Denio, 332, and 3 Comst. 379, warn us to be careful how we express ourselves on that subject.

We do find cases of trespass where judges have adopted a mode of calculating damages for taking coals, that is substantially equivalent to the rule laid down by the Common Pleas in this case, even where no wilful wrong was done, unless the taking of the coal out by the plaintiff's entry was regarded as such. But even then, we cannot avoid feeling that there is a taint of arbitrariness in such a mode of calculation, because it does not truly mete out

just compensation: 5 Mees. & W. 351; 9 .a. 572; 2 Queen's B. 283; and see 28 Eng. L. & E. R. 175.

We prefer the rule in *Wood vs. Morewood*, 3 Queen's B. 440, note, where Parke, B., decided, in a case of trover for taking coals, that if the defendant acted fairly and honestly, in the full belief of his right, then the measure of damages is the fair value of the coals as if the coal field had been purchased from the plaintiff. See, also, Bainbridge on Mines and Minerals, 510; 17 Pick. 1.

Where the defendant's conduct, measured by the standard of ordinary morality and care, which is the standard of the law, is not chargeable with fraud, violence, malice, or wilful negligence or wrong, the value of the property taken and converted is the measure of just compensation. If raw material has, after appropriation, and without such wrong, been changed by manufacture into a new species of property, as grain into whiskey, grapes into wine, furs into hats, hides into leather, or trees into timber, the law either refuses the action of trover for the new article, or limits the recovery to the value of the original article: 6 Hill, 425, and note; 21 Barbour, 92; 23 Conn. 523; 38 Maine, 174.

Where there is no wrongful purpose or wrongful negligence in the defendant, compensation for the real injury done is the purpose of all remedies; and so long as we bear this in mind we shall have but little difficulty in managing the forms of actions so as to secure a fair result. If the defendant in this case was guilty of no intentional wrong, he ought not to have been charged with the value of the coal after he had been at the expense of mining it, but only with its value *in place*, with such other damage to the land as his mining may have caused. Such would manifestly be the measure in an action of trespass for mesne profits: 7 Casey, 456.

Judgment reversed, and a new trial awarded

READ, J., dissented.

RECENT ENGLISH DECISIONS.

*In the Court of Exchequer—November, 1861.*EMERTON vs. MATHEWS.¹

A butcher purchased a carcase of beef exposed for sale in Newgate market, of a meat salesman there, without any express warranty of its soundness. Upon the meat being cooked, it was discovered to be unfit for human food, and returned. The defect did not appear when it was raw, and there was no evidence that defendant knew, or had any reason to suspect, that the beef was otherwise than good and wholesome meat, fit for human food :

Held, that there was no implied warranty in such case, and, as there was no proof of any express warranty, the plaintiff could not recover ; that no action for deceit would lie, as there did not appear, on the part of the defendant, to be fraud.

This was an action by a butcher against a meat salesman (who is a person that sells on commission the meat consigned to him by his employers,) for a breach of an implied warranty that certain meat exposed by him in Newgate market for sale, was then good and fit for human food. It appeared that on the 20th October the plaintiff, a butcher, bought of the defendant, a meat salesman, 60 stone of beef, at 2s. 6d. a stone, the meat being at the time publicly exposed for sale in Newgate market. It had not then the appearance of being bad or unfit for human food. The plaintiff took it away, and in about two hours afterwards cut up part of it and sold it to his customers. On cooking it, it was found to be very offensive, both to the taste and smell, and was represented as like the meat of an animal that had been lately physicked, and altogether unfit for human food. The plaintiff, on hearing this, returned the residue to the defendant, who sold it as refuse for 6d. a stone.

The declaration stated that the defendant warranted certain meat to be fit for human food, and sold the same to the plaintiff, whereas it was not fit for human food, whereby the plaintiff lost the money he paid to the defendant for it, and the profit he would have made by selling the same to his customers, and was injured

¹ From 5 Law Times, N S., p. 681.

and damaged in his character of a butcher, and put to expense in returning the said meat to the defendant.

Pleas: 1. Denying the warranty. 2. That it was unfit for human food at the time of the alleged warranty.

The cause was tried before the Common Sergeant, in the Lord Mayor's Court, in London, when, as no express warranty was proved, he directed a verdict to be entered for the plaintiff for £8, reserving leave to the defendant to move to set that verdict aside and enter a nonsuit, with liberty to the plaintiff to amend the declaration if the court above should be of opinion that a right of action existed upon the facts of the case, and a rule *nisi* having been obtained,

J. C. F. S. Day showed cause. There was no express warranty with this meat when it was sold, nor was there any evidence that the defendant, at the time of sale, knew it was unfit for human food; but in every sale of meat, the meat being exposed for sale in a public market, intended for, and known as intended for, human food, there is a warranty *implied* that it is sound and fit for human food. The plaintiff being a butcher makes no difference, and the public should be protected. At all events, the plaintiff would be entitled to maintain an action upon the case without proving fraud as against the defendant. The Legislature has, upon several occasions, made the sale of unwholesome provisions a criminal offence: and such a sale, whether it involves a warranty of soundness or not, express or implied, is a nullity, and the purchase-money may be recovered back in an action for money had and received. If the court should be of that opinion, the declaration is, by leave reserved at the trial, to be amended accordingly. (The Pillory and Tumbril Act, 1266; 1 Stat. at Large, 51 Hen. 3, stat. 6, s. 3; the Bakers' and Brewers' Act, temp. inc., 1 Stat. at Large, 11 & 12 Vict., c. 107, s. 3; and the 14 & 15 Vict., c. 91, s. 12. See, also, "Action of Deceit," 11 Edw. 4, p. 6; Brief de Deceit sur le Cas, 9 Hen. 6, p. 53; 4 Inst. 261; *Roswell vs. Vaughan*, Cro. Jac. 196: and *Burnby vs. Bollett*, 16 W. & M. 644, were cited.)

Keane, contra, in support of the rule. It has been argued that an action for money had and received would lie, because the con-

tract is illegal and void; that there has been a failure of consideration, and therefore it is void *ab initio*. But the very essence of that offence would be, a guilty knowledge on the part of the defendant, and here none is proved, nor could be proved, for in truth none existed. The defendant believed, when he sold the meat to the plaintiff, that it was perfectly sound, and could then no more see it as unfit for human food than the plaintiff. The duty of seeing that meat sold is sound, is only laid upon a person who must have the opportunity of knowing whether it be sound or no. This is shown by the use of the words "marcellarii" and "carnifices," as opposed to "carnarii." How could a person be convicted under the criminal statutes that have been referred to, for selling unwholesome provisions, without showing the person charged to have a guilty knowledge of the offence? Suppose the action to have been brought for deceit, it could not be supported upon the facts of this case, because the very gist of it would be a *scienter*, and it is clear no *'scienter* could be proved. The subject matter was discussed in *Burnby vs. Bollett*, but the point now raised was not decided. So far as that case goes, it is in favor of the defendant here.

Cur. adv. vult.

Jan. 14.—POLLOCK, C. B., delivered judgment. This case was argued last term before my brothers Martin, Bramwell, and myself, on a point reserved by the Common Sergeant. It was an action upon an alleged warranty that a carcase of beef, sold by the defendant to the plaintiff, was fit for human food. The evidence proved that the plaintiff was a butcher, or retailer of meat, and the defendant was a salesman in Newgate market, within the city of London. A salesman is a person who sells, on commission, meat consigned to him by his employers. The carcase in question had been consigned to him for sale in the usual course of business. It was publicly exposed for sale in Newgate market; it looked bright to the eye and appeared to be good meat. The plaintiff saw it and bought it, believing it to be so. It was taken to the shop and cut up into several joints, and retailed to the customers. On being cooked, it became black, and had a very bitter taste, and it must be taken as

a fact in the case, that it was not fit for human food. The defect, however, was such that it could not be detected so long as the meat was raw, and it appeared only on its undergoing the process of cooking. There was no evidence that the defendant knew, or had the means of knowing, or any reason to suspect that the meat in question was not good, wholesome meat, fit for human food. The plaintiff bought on his own inspection, with no actual warranty, nor was anything said about the quality. These were the facts, as proved at the trial. The learned counsel for the defendant objected that there was no evidence of any warranty, and it was agreed by the counsel on both sides that there was no fraud on the part of the defendant, and no knowledge of any defect. A verdict by consent was entered for the plaintiff, with leave reserved to the defendant by the learned Common Sergeant, to enter a nonsuit. The plaintiff was to be at liberty to amend the declaration in any way he thought fit, if the court should be of opinion that any cause of action existed under the circumstances. The questions arising in the case are, first, is the count on the warranty sustained? and if not, secondly, can the count for money had and received be made available? No action for deceit was suggested, because, it being admitted that there was no fraud, and that the defendant acted *bona fide*, obviously no such action could be maintained. On the first point, as nothing passed at the time of sale about the quality of the meat, the question is, whether there is by law a warranty, under the circumstances of this case, that the carcass sold by the defendant to the plaintiff was fit for human food, and was free from any such defect as it turned out to have. The undoubted general law is, that in the absence of all fraud as to the specific article sold, the buyer having an opportunity to examine it, and selecting it, the rule of *caveat emptor* applies. *Chater vs. Hopkins*, 4 Mau. & S. 399; *Parkins vs. Lee*, 2 East, 314; *Morley vs. Attenborough*, 3 East, 500. And the plaintiff has to establish that in the case of a salesman dealing with a retail buyer, there is an exception to the general rule, and that there is an implied warranty that the meat is fit for the purpose for which, in all probability, it was bought. There was no evidence as to the time when the busi-

ness of meat salesmen commenced in London. It is, comparatively speaking, of modern date. At present it is very considerable, and since the introduction of railways large supplies of slaughtered meat arrive from the country to be disposed of by salesmen, the nature of whose occupation is well known. We have taken time to consider our judgment, because it was contended, on the argument, that in all cases of the sale of an article to be used as food for man, the law implied a warranty that it was fit for the purpose. Another ground was, that it was penal to expose meat for sale that was unfit for human food; and in support of this view, our attention was called to the statutes 51 Hen. 3 and Edw. 4, not printed in the statute book, but referred to in the 4th Inst., p. 261; also to a more recent act of Parliament, 14 & 15 Vict., c. 91, (local and personal,) called the City of London Sewers Act, passed in 1851; and it was argued that, the contract being illegal, the money might be recovered back, as a count might be framed on the statutes. Any legal point which may in the remotest degree bear on the subject of health and the general safety of the community, is deserving of the fullest consideration. Having given that consideration, we are of opinion that there is no case that at all governs the present, and none of the cases cited at the bar decide this case, though in *Burnby vs. Bollett*, 16 M. & W. 644, all the law is examined and collected, and the matter very much discussed, that a salesman offering for sale a carcase with a defect, of which he was not only ignorant, but had not the means of knowing of the defect being latent, he is not liable to any penalty, and does not, as a matter of law, imply a warranty that the carcase is fit for human food, and is not bound to return the price of it, should it turn out not to be fit for sale, and we think that the counts suggested would be bad on demurrer. The result, therefore, is, that the rule to enter a nonsuit must be made absolute.

Rule absolute.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF NEW YORK, GENERAL TERM, SEVENTH DISTRICT.
December, 1860, and March, 1861.¹

Statute of Limitations—Assignees for Benefit of Creditors—Their Authority.—Partial payments, in order to take a case out of the statute of limitations, must be made under circumstances to warrant a finding, as a question of fact, that the debtor intended to recognise, as subsisting, the debt in question, and that he was willing to pay it: *Pickett vs. King*.

A debtor, upon assigning his property in trust for the benefit of creditors, parts with all control of the property assigned, and appoints the assignees his trustees, to apply the proceeds as directed in the assignment: but they do not become his *agents* in such a sense as to have authority to make any new contract or promise binding upon him, or to make a *payment* upon any of his debts, which shall be equivalent to a new and express promise by him: *Id.*

Executory Contracts of Sale.—In every executory contract for the future sale and delivery of articles of merchandise, the law will imply an agreement that the property shall be of merchantable quality: *Hamilton vs. Gangard*.

Where the defendant, by a written contract, agreed to sell and deliver to S. & M. his crop of corn then growing on about thirty acres of land, to be delivered "in merchantable order," at a specified price: *held*, that he was bound to deliver all the merchantable corn that grew on the land, and no more. And the defendant, claiming the right to deliver the whole crop, although three-fourths of it was of unmerchantable quality, having tendered the good and bad together, it was *held*, that this was not a proper tender or offer of performance, and that the purchasers were not bound to receive the corn tendered, but might treat the contract as broken, and bring their action for damages: *Id.*

That the measure of damages in such action was the difference between the contract price and the market value of the merchantable corn at the time it should have been delivered, together with the amount advanced on the contract, and interest: *Id.*

¹ From Hon. O. L. Barbour, Reporter.

GENERAL TERM, FIFTH DISTRICT, July 2, 1861.

Execution of Lease—Guaranty.—One who has, by an instrument indorsed upon a lease, guaranteed the fulfilment of the covenants in the lease by the lessees, is bound by his guaranty, although the lease is executed by only one of the lessees, where it appears that both lessees occupied the demised premises, and had possession of all the personal property mentioned in the lease, for the whole term: *McLaughlin vs. McGovern*

Insurance—Application—Misstatements—Conditions of Policy.—An insurance company is chargeable with knowledge of all the facts stated by an applicant to the company's agent, respecting an applicant's title and interest in the premises; and if the applicant truly states to the agent the real condition of the property, he cannot be held to have made any misstatement, or practised any concealment, notwithstanding the written application varies from such statement: *Hodgkins vs. The Montgomery County Mutual Insurance Company*.

Among the conditions, &c., attached to a policy of insurance, were the following: All persons sustaining damage by fire were forthwith to give notice to the company, and within forty days they were to "deliver in a particular account" of such loss or damage. Losses were payable by the company within three months, &c. Then followed this clause: "*All communications and notices to the company must be post-paid, and directed to the Secretary, at C.*" The statement of the loss was made out, sworn to, and deposited in the post-office, addressed to the secretary of the company at C." but was never received by the company. *Held*, that the condition requiring the insured to "deliver in" the statement of loss, was a positive requirement of the policy on that particular subject, not superseded or nullified by the general direction to forward communications and notices by mail, and that in sending such statement by mail, the insured had not complied with the condition.

GENERAL TERM, SEVENTH DISTRICT, Sept. 2, 1861.

Parol Evidence—Bond upon Attachments against Vessels—Power of Master—Record of Judgment.—Where there are several causes of action embraced in the same complaint, and the recovery appears to be general, parol evidence is competent to show upon which cause or causes of action specified the trial was had and judgment obtained: *Stedman vs. Pachin*.

A vessel, owned by the defendant, being seized by the sheriff at Cleva-

land, upon process issued at the suit of McE., upon a claim against the vessel under certain statutes of Ohio, the master, to effect the release of the vessel, executed a bond with the plaintiff and one P., as sureties conditioned for the return of the boat to satisfy any judgment upon the claim of McE., or, in default thereof, for its payment. The boat was thereupon released, and the defendant, being informed of the proceedings of the master, employed counsel, and defended the suit commenced by McE. *Held*, (1.) That it was the duty of the master, and within his authority, to execute the bond. (2.) That the defendant, having sanctioned the giving of the bond, and proceeded to contest and defend the action in which it was given, this was equivalent to an antecedent authority to the master. (3.) That if the statutes under which the vessel was seized were valid as to the citizens of Ohio, they were equally valid as to all parties litigating in the courts of Ohio, in proceedings founded upon them. (4.) That the proceedings and seizure appearing to be regular under the statutes of Ohio, the defendant, by appearing and defending the action, became bound by the judgment of the court in favor of the validity of the plaintiff's claim, and that the record of that judgment was conclusive against him, in an action by the plaintiff for the reimbursement of money he had been compelled to pay as one of the sureties in the bond: *Id*.

Bills of an Insolvent Bank—When a Set-off.—Where bills of a bank are obtained by one of its debtors after it becomes insolvent and stops payment, they cannot be used as a set-off or counter-claim in an action brought by the receiver of the bank upon a promissory note of the debtor, held by the bank at the time of its failure: *Divers Receivers, &c. vs. Phelps*.

Executors bound to pay Moneys Due upon a Contract for Purchase of Land—Agreement.—Heirs or devisees can compel an executor or administrator to pay the purchase-money remaining unpaid upon lands purchased by the testator or intestate, and held by him, under a contract, at the time of his death, out of the assets in the hands of such executor or administrator: *Iamfort et al. vs. Beeman et al.*

The contract debt for the purchase-money is not a mortgage, within the intent and meaning of the statute making mortgages given by an ancestor or testator a charge upon the land descending to an heir or passing to a devisee, to be paid by the heir or devisee, unless there be an express direction to the contrary in the will (1 Rev. St. 549, § 4): *Id*.

Where an executrix agreed to pay all the debts of the testator, if her

co-executor would give up the whole estate to her, to which they assented, and she therefore took the assets and paid the debts, it was *held*, that the agreement was founded on a good consideration, and was binding upon her, and that the same having been fully executed on her part, her administrator, after her death, could not gainsay it, or claim anything from it, as against any person interested in the remainder: *Id.*

Presentment of Drafts—Principal and Agent.—The neglect to present a draft, payable on demand, for four days, during which time the drawee fails, will discharge the drawer: *Brady vs. Little Miami Railroad Company.*

Where a person residing in New York, and acting as the authorized agent of another, requested a friend at Cincinnati to collect from a corporation there a dividend due to his principal, upon stock, and to transmit to him a draft for the amount, *held*, that if the agent left New York while expecting the draft, it was his duty to leave authority with some one to present the draft when received: *Id.*

And that for the negligence of the agent, in not presenting such draft for payment within the proper time, the principal was responsible: *Id.*

Deposits in Banks.—Where money is deposited in a bank, generally, to the credit of the depositor, and is not appropriated to the payment of a note of his, held by the bank, or to any other special purpose, the relation of debtor and creditor is created between the depositor and the bank; the latter becoming a debtor to the former for the amount deposited, and liable to pay on demand. The bank has the right, at any time, to apply the amount in payment of a note part due, but is under no obligation so to apply it: *Marsh vs. The Oneida Central Bank.*

If the bank omits to make the application, and postpones it until after the recovery of a judgment upon the note, this will not affect the right. It may apply the money after, as well as before the recovery of the judgment, in payment of the debt due from the depositor: *Id.*

Whether the application is made or not, is immaterial. If not made, the bank may, in an action by the depositor, or his assignee, to recover the money deposited, avail itself of its judgment as an equitable set-off: *Id.*

Vendor and Purchaser.—The refusal of a purchaser to complete his purchase because there is a lease on the premises, will not deprive him of the right to object that there are other incumbrances on the same property: *Morange vs. Morris.*

Such refusal might relieve the vendor from the necessity of tendering performance on his part, but will not relieve him from the consequences of not being able to give a good title to the premises at the time agreed on: *Id.*

Where the vendor is unable to perform, performance on the part of the purchaser is not necessary, except in case the purchaser seeks to compel a performance, or to recover damages without rescinding the contract: *Id.*

If the vendor cannot give a good title at the time agreed on, the purchaser may refuse to take the property and rescind the contract: *Id.*

Statute of Limitations.—A temporary absence from the State, without a change of residence, is not the exception contained in the statute of limitations, and does not prevent the running of the statute during such absence: *Hickock & Starr vs. Bliss et al*

Where a referee finds that the defendant was absent from the State by *various journeys*, at least one year in the aggregate, during the six years, this is not such a finding of absence as will warrant a judgment against the defendant who has pleaded the statute of limitations: *Id.*

What amounts to Payment of a Note—Mistake of Bank Officers.—A note, made by W., and payable at the Irving Bank, was discounted by the Seventh Ward Bank. Subsequently, W. formed a partnership with D., under the firm name of W. & Co., whereupon the firm directed the Irving Bank to charge the notes of W., including the one in question, to the account of W. & Co. Prior to the maturity of the note, W. died, and D. directed the Irving Bank not to charge the individual notes of W. to the account of W. & Co. When the note matured, the Seventh Ward Bank, as the owner thereof, presented it to the paying teller of the Irving Bank, who certified it as paid, and charged the amount to W. & Co., who had not enough funds in the bank to pay it, and W. had none there. The Seventh Ward Bank stamped the note "paid." On discovering the mistake of its teller in certifying the note, and before 3 o'clock of the same day, the Irving Bank notified the Seventh Ward Bank of the mistake, and requested that the certificate be cancelled, which was refused. The Irving Bank then paid to the Seventh Ward Bank the full amount of the note, and received the same back, stamped "paid." On the same day, and before 3 o'clock P. M., the note was again presented at the Irving Bank, and payment demanded, and was protested for non-payment, and notice

given to the indorsers; *held*, that the note was not to be deemed paid, and that the Irving Bank could maintain an action thereon against the indorsers: *The Irving Bank vs. Wetherald & Young*.

Vendor and Purchaser.—If the purchaser of goods, which, by the terms of the contract of sale, are to be delivered and paid for at a specified time, does not tender the price and take the goods within the time agreed upon, the vendor may request him to pay for and take the goods, and in case of his refusal, may abandon and rescind the contract and dispose of the goods as if no contract had been made; or, he may, on due notice to the purchaser, re-sell the goods as the property of the latter, and recover of him the sum lost by the re-sale, together with the expense of keeping the goods: *McEachron vs. Randles*.

This right of the vendor to re-sell the goods, however, when the contract is not rescinded, and when there is no express stipulation authorizing it in the contract, can only be exercised after due notice to the purchaser, of the time when, and the place where, the re-sale will be made: *Id*.

Assignability of a Contract—Vendor and Vendee.—A contract upon which an action would lie by the personal representatives of a party thereto, in case of his death, for the enforcement of his rights, and remedies under the same, is legally assignable. So held in respect to a written agreement by the defendant to deliver to the plaintiff's assignor all the potatoes the defendant should raise the following season, delivered on the boat, at a specified price per barrel: *Sears vs. Conover*.

A notice, given by the assignee of such a contract, to the vendor, that he is ready to pay for the potatoes, on delivery, according to the terms of the contract, is a sufficient notification of readiness on his part: *Id*.

And if the vendor, at the time of receiving such notice, and with knowledge of the assignment of the contract, refuses to deliver the potatoes, stating that he has sold them to other persons, this will supersede the necessity of any demand after the potatoes are harvested: *Id*.

SUPREME COURT OF CONNECTICUT.¹

Municipal Subscriptions to Railroads—Right of bona fide Holder of Bonds—Acquiescence of Citizens of Municipality in issue of Bonds, how

¹ From John Hooker, Esq., State Reporter.

far an Equitable Estoppel—Bond Payable to Bearer, how far Negotiable.—An act of the legislature, passed May, 1847, empowered the city of New London to issue bonds to the amount of \$100,000, to be loaned, on proper security, to the New London, Willimantic and Springfield Railroad Company, a corporation chartered at the same session, to aid in the construction and completion of its road; the act containing a proviso that it should not take effect *until approved by two-thirds of the electors present at a city meeting held for that purpose, and a copy of its doings lodged in the office of the Secretary of the State.* A meeting of the city was holden for the purpose of acting on the subject, on the 2d day of March, 1850, another on the 12th of the same month, and another on the 10th day of March, 1852, at each of which a vote was taken upon the question of approval, and the vote in its favor was less than two-thirds. Another meeting was called and holden on the 14th day of April, 1852, at which a vote of more than two-thirds was obtained in favor of the approval. *Held*, that the power of the city on the subject was not exhausted by its first action, and that the action of the last meeting was a valid acceptance of the power to issue the bonds: *Society for Savings vs. The City of New London.*

Held, also, that the power to accept the act was not lost by the delay, the legislature having limited no time within which the city should act on the subject, and the railroad not being then completed (the legislature having extended the time for its completion), and the railroad company having therefore not been in a condition to give the security required by the act: *Id.*

The bonds, which were payable to bearer, were sold in the market by the railroad company, to whom they were delivered, and were purchased by the plaintiffs without any knowledge of the prior unfavorable action of the city. A copy of the proceedings of the last meeting had been duly lodged with the Secretary of the State. *Held*, that the plaintiffs were not bound to look beyond the certificate thus lodged, and as *bona fide* holders of the bonds, could not be affected by the prior action of the city, even if, against parties differently situated, it might have constituted a valid defence: *Id.*

The bonds were in the following form: "This certifies that the mayor, aldermen, common council, and freemen of the city of New London are indebted to the N. L., W. & P. R. R. Co. or bearer, in the principal sum of \$1000, payable to said company or bearer, at the end of fifteen

years from the 1st day of July, 1852, with 6 per cent. interest thereon, payable semi-annually on presentation of the annexed interest warrants." (Signed by the mayor and treasurer of the city, and sealed with the corporate seal.) *Held*, that the bonds were negotiable, and that suit could be brought on them in the name of the holder: *Id*.

The bonds had been publicly sold, with the knowledge of all the inhabitants of the city; many of them had been deposited with the Treasurer of the State by sundry banks as security for their circulation—one of these banks, located in New London, having for several years published in a newspaper there a quarterly statement embracing this fact; and the city had paid the semi-annual interest on the bonds down to July, 1859, and the payments had been reported at the annual city meetings. During all this time no citizen had taken any measures to prevent the sale of the bonds or the payment of the interest, or had given notice of any doubt as to their validity. *Held*, that the city, in these circumstances, was equitably estopped from denying the validity of the bonds against parties who held them in good faith, and that individual citizens and tax payers, having thus acquiesced in the conduct of the city, were equally estopped from denying their validity, so far as their individual rights were concerned: *Id*.

The statute (Rev. Stat., tit. 3, § 165), which provides that whenever any amendment of the charter of any corporation shall be made, if not otherwise specially provided, it shall not become operative unless accepted within six months thereafter by the corporation, has no application to such an act as that empowering the city, in this case, to issue the bonds in question: *Id*.

The act empowered the city to issue the bonds in aid of the New London, Willimantic, and Springfield Railroad Company, and to deliver them to that company. By an act passed by the legislature at its next session, this railroad company was merged in a new corporation, named the New London, Willimantic, and Palmer Railroad Corporation, formed by the union of this company with another organized under an act of the legislature of Massachusetts, the new company taking all the rights and assuming the duties of the former ones. The court found that the new company was substantially the same as the old one. *Held*, that the city acted legally in voting to issue the bonds for the benefit of the new company, and that they were properly delivered to that company: *Id*.

Criminal Law—Arson—Pleading—New Trial.—Arson is a crime against the security of a dwelling-house, as such, and not against the building as property; and it is therefore proper, in an indictment for the crime, to describe the house burned as the house of the person dwelling in it, without reference to the question of ownership: *State vs. Tool*.

A house consisting of two distinct tenements, occupied in severalty, should not be described in such an indictment as the dwelling-house of both occupants, as such a description implies a joint occupancy: *Id*.

Where there is no interior communication between different parts of the same building, which are separately occupied, the parts are to be regarded as separate buildings: *Id*.

And it seems that if there is such interior communication, but it is not in actual use, and the occupation of the parts is strictly in severalty, the parts would still be regarded as separate buildings: *Id*.

Upon a motion for a new trial, the instructions of the court and the facts detailed in the motion will be considered solely in their relation to questions made on the trial below: *Id*.

Statute of Limitations—Adverse Possession—Party Wall.—The doctrine of adverse possession is to be taken strictly. Such a possession is not to be made out by inference, but by clear and positive proof. Every presumption is in favor of possession in subordination to the title of the true owner: *Huntington vs. Whaley*.

No title by such possession can be acquired unless the party has the actual use and occupation of the land, nor unless the owner has so lost his possession that he can maintain an action to recover it: *Id*.

Where the divisional fence between the lands of A. and B. was a stone wall three feet wide, set wholly on the land of A., and B. had for more than fifteen years held exclusive possession of his own land up to the wall, treating the centre of the wall as the dividing line, and believing it to be so, but with no knowledge of such claim on the part of A., and no other possession of the ground covered by the wall, it was held, that there was not a sufficient adverse possession to vest in B. a title to the centre of the wall: *Id*.

Bastardy Bond—Division of Township—Breach of Condition.—A bond was given by the father of an illegitimate child to the town of East Hartford, where the child was born and had its settlement, to save the town from expense for its support; the condition reciting the fact that the child

was chargeable to East Hartford, and providing that the bond should be void if the obligor should save *said town* harmless from all expense by reason of the child becoming chargeable *thereunto*. The town of East Hartford was afterwards divided by the act of the legislature, and the part on which the child was born and lived was set off as a new town by the name of Manchester, to which a portion of another town was afterwards annexed. The act incorporating the new town imposed upon it the burden of supporting all paupers having their ordinary residence on the territory constituting the town. The father afterwards neglected to support the child, and it became a charge upon the town of Manchester. *Held*, 1. That the benefit of the bond accrued to the town of Manchester on its incorporation. 2. That the neglect of the obligor to save that town from expense in the support of the child, was a breach of the bond. 3. That a suit could be maintained on the bond, in the name of the town of East Hartford, for the benefit of the town of Manchester: *East Hartford vs. Hunn*.

SUPREME COURT OF MASSACHUSETTS.¹

Will—Widow Electing to claim Dower—Residuary Legatees Entitled to Income of Fund Bequeathed to her for Life, with remainder to Specific Legatees.—A testator, in his will, after various devises and bequests, directed a certain sum to be invested, and the income thereof to be paid to his wife during her life, and, after her death, to be distributed among various legatees, in certain specified sums, and gave the rest of his estate to his residuary legatees. He died without leaving issue, and his widow waived the provisions of the will in her behalf, and thereby became entitled to a larger share of his estate than the will gave her. *Held*, that the residuary legatees are entitled, during the life of the widow, to the income of the fund provided for her, and, after her death, the principal should go to the legatees named in the will, in like manner as if the widow had accepted the provision therein made for her: *Firth vs. Denny*.

Will—Trust for Maintenance of Beneficiary and his Family—Jurisdiction to enforce Trust, where Beneficiaries reside in another State.—Under a will creating a trust fund, with directions to pay the income yearly to the testator's son, "for the support of himself and his family, and the education of his children," the income, when received by the

¹ From Charles Allen, Esq., State Reporter.

son, is taken in trust, and his wife and children can enforce its due appropriation, in part for their benefit, in equity; and, if the will was made by a resident of this Commonwealth, and was proved in this Commonwealth, and the trustee, who by the terms of the will holds the principal trust fund, lives in this Commonwealth, this court has jurisdiction to regulate the proper administration of the trust, although the testator's son, and his wife and children, all live in another State: *Chase vs Chase*.

Water-course—Grant of Conflicting Right by Owner—Change of User by Grantees—Right of Riparian Proprietors to Use of Water.—Under a deed of water privilege, conveying "the right to draw two hundred square inches of water, under fourteen feet head, out of the surplus water from the top of my grist-mill flume, at S., however, not intending by this deed to convey the water to the injury of the following privileges, viz.: to the building now occupied by A. S. as a rake shop; to the tannery now occupied by A. B.; and the scythe shop now occupied by J. H. M., having reference to the deeds of the above described privileges," the grantee's privilege is subject to the prior use of the quantity of water which, at the time of the conveyance, was reasonably necessary to carry on and operate, at all seasons of the year, and in the state and condition in which they then existed, the mills and works therein of the grantor, and also of the quantity belonging to the three privileges mentioned, reference being had to the deeds thereof for the amount. And the grantee's privilege is not increased by the subsequent removal of the rake shop, and the erection of a new and larger building on its site, which is used wholly for different purposes; or by the subsequent destruction of the scythe shop, and discontinuance of the use of water there, although the deed of the privilege for the scythe shop only conveyed the water to be used at that particular place, nor has he a right to complain of the place where, or the purposes for which, such prior use is made: *Pratt vs. Lamson*.

If a natural stream of water flows and forms the boundary between the lands of different proprietors, the fee of each owner includes one-half of the bed of the stream; but each is entitled to use one-half of the water which flows in the stream, without regard to the position and course of its principal channel and current: *Id.*

If a proprietor of land which is bounded upon a natural stream, appropriates to his own use so much of the passing water as he is enabled to control, by means of structures erected upon and within the limits of his own estate, even if it be the whole of it, he can thereby gain no prescriptive

right to appropriate and use more than one-half of the same, so long as the opposite proprietor neither uses, nor seeks to use, nor makes any provision, nor has any occasion, for the use of any part of the stream to which he is entitled : *Id.*

If the general owner of a mill privilege, in which others are interested, has, with their knowledge, acquiescence, and consent, built on his own land a new dam and works, by which the water is supplied to a common flume, they cannot recover compensation for any damage which they may thereby sustain : *Id.*

Infant—Action by Local against Foreign Guardian for Maintenance of Ward after Appointment.—One who has applied for or obtained an appointment in this Commonwealth, as guardian of minor children who have been under her care with the consent of their guardian appointed in another State, may, nevertheless, maintain an action against the latter for their support and education, after the time of her own appointment : *Spring vs. Woodworth.*

Water-course—Right to Dam non-navigable Streams—Damage by Back Water.—The owner of land lying upon both sides of a natural stream of water which is not navigable, may lawfully erect thereon a dam across the stream to such a height that in ordinary stages of the water it will not throw water back upon the wheels of an ancient mill above, although, in consequence of the erection of the dam, the ice, when it breaks up in the spring, becomes packed together above the dam, and the water is thereby set back so as to flood the wheels to a greater height, and for a longer time, than it has done before at that season : *Smith vs. The Agawam Canal Company.*

Trover—What not a Conversion—Receipt of Proceeds of a Tortious Sale.—One who, knowing that property is under an attachment, suffers it to be sent away and sold by the owner, and receives the avails arising from the sale, in pursuance of a previous arrangement to that effect, is not thereby guilty of a conversion : *Polley vs. Lenox Iron Works.*

Contract, Construction of—Liquidated Damages.—A. and B. made an agreement in writing, by which A. agreed, on or before a certain time, to sell and deliver up all his stock and trade, and tools used in manufacturing tinware, to B., at specified rates, which B. agreed to pay therefor. The agreement further contained the following clause : "It is also hereby agreed between the parties, that in case either party shall fail to comply with the terms of this agreement, the party so failing shall forfeit to the

other party the sum of three hundred dollars, which shall be paid in full, on or before the forfeiture as above." *Held*, that on a failure by B. to perform the contract, he was liable for the full sum of three hundred dollars as liquidated damages : *Lynde vs. Thompson*.

Sale of Railroad Bonds—Erroneous Certificate of their being secured by a first Mortgage, how far Defence to Note for Purchase-Money—Whether Purchaser relied on Certificate, to be left to Jury.—If a railroad company issues and sells bonds bearing upon their face a certificate, signed by persons describing themselves as trustees, that the same are secured by a first mortgage to them in trust for the bondholders, there is no absolute presumption that a purchaser thereof relies upon such certificate; and, in an action upon a note given by him as a part of the consideration of the purchase, the question should be submitted to the jury to determine whether he accepted the bond, relying to any extent upon such certificate : *Edwards vs. Marcy*.

LEGAL INTELLIGENCE AND REFORM.

The late session of the British Parliament has been more than commonly productive in law reforms. It is a fact not fully understood by the profession in this country, in many instances, we believe, that legal reforms, taking their rise in Great Britain from the example of this country, have far outstripped us in almost all useful improvements in legislation in the last twenty years. In the simplification of process and procedure, and in the accommodation of remedies to afford the desired results, in all the courts of the nation, high or low, the late English statutes, called the Common Law Procedure Acts, are well worthy of imitation upon this side of the Atlantic. In some respects, our codes of practice, and the consolidation of the different forms of action, have been far more radical than the English reforms; but they have been, as a general thing, less adapted to produce the objects and purposes for which they were designed. This has been owing, in some degree, no doubt, to the undue admixture of unprofessional counsels in regard to these

reforms, and the necessity of deferring to the ignorance and inexperience of the lay element in our legislatures, in order to secure the adoption of any measure of reform after it was matured. Whether that obstruction in the way of judicious law reform is inseparable from our free and democratic institutions, it is not yet time to decide with confidence. We see no reason to question why the legislature of any of the American States may not ultimately be made as willing to take the counsel of a standing legal committee of advice in regard to all changes in jurisprudence, or in judicial administration, as the British Parliament. The experiment has scarcely been, as yet, attempted in this country, and, until it is, there is no fair ground to argue that it would not meet with acceptance. As a general thing, the pretensions and presumptuousness of mere unprofessional men in the State legislatures, with rare exceptions, growing out of moral or mental obliquity, has been more owing to the false glosses of manœuvring political sects and schools probably, than to any innate perversity of temper or want of fairness and teachableness of disposition in the members. Our legislatures have only to know that the British Parliament, with ten or twenty times the learning and experience of any of our State legislatures, never attempt to adopt any changes in the law until it has been referred to a special commission, learned in that department, and has then received the revision of a standing committee of the judges and others learned in such matters: Our legislatures have only to know this to induce them, we trust, to make their reforms less radical, and, at the same time, more efficient.

But the subject which we now desire to bring to the notice of the profession, is the late statutory provision of the British Parliament for the ascertainment of the law of foreign States. By the 22 and 23 Vict. c. 63, and the 24 Vict. c. 11, provision is made both for the ascertainment of the laws of the different portions of the British Empire and of foreign countries, whenever it shall come in question in any of the courts of the realm.

This has hitherto been done by means of the testimony of those skilled in the laws of the country whose jurisdiction affects the cause of the action before the court. This was often a most perplexing

matter, since the witnesses assumed the character of counsel far more generally than would have been expected by those who had not had experience upon the subject.

These statutes provide, in substance, that any of the superior courts in her majesty's dominions may remit a cause pending wherein it shall become important to determine any question of foreign law, to the courts of the State or country whose laws are brought in question, with specific inquiries in regard to the law, desiring the opinion of the court of last resort thereon. And this opinion, when obtained, the domestic tribunal may apply to the determination of the cause, the same as if it had been pronounced by the court where the cause is pending; or they may submit the cause to a jury, with this opinion as conclusive evidence of the foreign law, or as evidence of the law, in any other portion of the realm.

And if the court, upon the return of such opinion, are in doubt in regard to the case having been properly understood, or being fully stated, they may remit it to the same, or any other foreign court in the State whose laws are in question, with or without amendment, as often as may be necessary or expedient.

If some expedient of this, or a similar character, could be devised for supplying to courts in all cases the information which they now derive in a very imperfect manner, from the testimony of experts, upon various subjects, it would be a most gratifying advance in judicial reform.

The article in the *London Jurist*, June 29, 1861, will explain the nature of these provisions more fully, and cannot fail to be of interest to the profession here.

A valuable addition to the law of this country has just been made by the legislature in the stat. 24 Vict. c. 11, intituled "an act to afford facilities for the better ascertainment of the law of foreign countries when pleaded in courts within her Majesty's dominions." Before, however, proceeding to state its provisions, it will be useful to advert to the previous state of the law, and the evils which that statute, and the 22 & 23 Vict. c. 63, intituled "an act to afford facilities for the more certain ascertainment of the law administered in one part of her Majesty's dominions when

pleaded in the courts of another part thereof," of which it is a great extension, were designed to remedy.

It has ever been an established principle of law, that courts of justice do not take judicial cognisance of the laws of foreign countries—whenever the existence of such comes in question before a court, it must be proved as a fact. And this is not peculiar to the English law, for it may be looked on as a maxim of general jurisprudence. (See Heinec. ad Pand., pars. 4, § 119; Id., pars. 1, § 103; Story's Conf. Laws, § 637, 5th ed.) But how is such a fact to be proved? The obvious and usual mode was by the testimony of witnesses skilled in the law of the country in question. Whether a witness offered for this purpose stood in a position to entitle him to give evidence on the subject as an expert was of course a question to be decided by the court or judge, and several reported cases show that this was occasionally a matter of some nicety.

The inconvenience, and often the inefficiency of this kind of evidence are well known to every practical lawyer. Partly owing to the uncertain character of the subjects to which they depose, partly owing to the circumstance that it is almost impossible to indict for perjury a man who only swears to his belief, testimony of the loosest and most dangerous kind is daily given in courts of justice by almost every species of experts—medical men, surveyors, &c. The testimony of lawyers as experts is less frequently required, but when it is, great conflict of opinion is often to be found among the witnesses. On questions relating to the law of France in particular, the most discordant opinions of eminent jurists and practitioners from that country are not unfrequently adduced in our courts—a fact which inevitably leads to one of these inferences—either that a loose standard of morality exists among the learned of that country, or, what we believe far more likely, that the law of France is in a very unsettled state upon many important matters—a conclusion much at variance with the favorite, though most erroneous notion of many at the present day, that the Codes Napoleon have succeeded in expelling all doubts from French jurisprudence, and reduced the whole law of

that country to a small volume, which every person, lawyer or layman, can carry in his pocket, and interpret for himself. And, whatever may be said of the evil resulting from courts of justice being compelled to resort to the testimony of experts to prove the laws of countries which are "foreign" in the proper sense of the word, it almost amounts to absurdity in the case of countries which are foreign in a technical sense only—i. e. those which, though governed by different laws from England, are still under the dominion of the British Crown, such as Scotland and the like.

To provide some remedy for these evils the two statutes to which we have alluded were passed. The 1st section of the former (the 22 & 23 Vict. c. 63) enables the courts in one part of her Majesty's dominions to remit a case for the opinion in law of a superior court in any other part thereof. By sect. 3, when a certified copy of the opinion is obtained, either party to the action may move the court to apply that opinion, "and the said court shall thereupon apply such opinion to such facts in the same manner as if the same had been pronounced by such court itself upon a case reserved for the opinion of the court, or upon special verdict of a jury; or the said last-mentioned court shall, if it think fit, when the said opinion has been obtained before trial, order such opinion to be submitted to the jury with the other facts of the case, *as evidence, or conclusive evidence, as the court may think fit*, of the foreign law therein stated, and the said opinion shall be so submitted to the jury."

This statute, it is obvious, went only a small part of the way towards remedying the mischief. But it has been more effectually attacked by the second—stat. 24 Vict. c. 11. The 1st section enables any of the superior courts within her Majesty's dominions to remit a case, with queries, to a court of any foreign state or country with which her Majesty may have made a convention for that purpose, for ascertainment of the law of such state. By sect. 2, when a certified copy of the opinion is obtained, either party may move the court to apply that opinion; "and the said court shall thereupon, if it shall see fit, apply such opinion to such facts. in the same manner as if the same had been pronounced by

such court itself upon a case reserved for the opinion of the court, or upon special verdict of a jury; or the said last-mentioned court shall, if it think fit, when the same opinion has been obtained before trial, order such opinion to be submitted to the jury, with the other facts of the case, *as conclusive evidence* of the foreign law therein stated, and the said opinion shall be so submitted to the jury: provided always, that if, after having obtained such certified copy, the court shall not be satisfied that the facts had been properly understood by the foreign court to which the case was remitted, or shall on any ground whatsoever be doubtful whether the opinion so certified does correctly represent the foreign law, as regards the facts to which it is to be applied, it shall be lawful for such court to remit the said case, either with or without alterations or amendments, to the same or to any other such superior court in such foreign state as aforesaid, and so from time to time as may be necessary or expedient."

There is another important provision in this statute, namely, that the courts in her Majesty's dominions may pronounce an opinion on a case remitted to them by a foreign court.

I. F. R.

NOTICES OF NEW BOOKS.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF THE STATE OF VERMONT. By WILLIAM G. SHAW. Vol. 82. New series, vol. 8. Rutland: George A. Tuttle & Co. 8vo., pp. 888.

There is no community on the globe better suited for democratic institutions than the State of Vermont, and none in which democratic institutions have worked better. Three reasons, among others, may be cited in explanation of this. The people of Vermont are highly intelligent and well educated. They are neither rich nor poor, without the temptations of great wealth or abject poverty, and they have no large cities. And a fourth reason might be alleged—that they have but a small admixture of foreign population. At any rate, it is certain that the institutions of Vermont are highly democratic, and it is equally certain that in no State is

property more secure, and are rights better protected. The judges of the Supreme Court are elected every year by the legislature, and yet Vermont has always had good judges and good law. Indeed, if judges are to be elected at all, we distinctly say that it is better that they should be elected every year than for a longer period, since, in the former case, there never comes a time when it is determined that one judge shall go out and his successor come in. A faithful magistrate will be re-elected year by year, almost as a matter of course. Paradoxical as it may seem, an annual election of judges is a nearer approach to an independent judiciary than an election for five, seven, or ten years. Chief Justice Redfield (now a resident of Boston, and a member of its bar), was again and again chosen by a legislature opposed to him in national politics, a fact which we mention as highly honorable to both parties.

The volume before us embraces the decisions during portions of the years 1859 and 1860. It shows that in Vermont, cases are carefully argued and well determined. The reporter has done his part well, though a little more of the process of compression might have been here and there advantageously applied.

Did our limits permit, we should gladly cite several of the cases which we had noted, as deciding points of interest to the profession or the public, or as evincing high judicial qualities on the part of the court, but we must content ourselves with a single specimen, on account of the importance and value of the doctrines laid down.

In *Nichols vs. Mudgett* (p. 546), the defendant being indebted to the plaintiff, who was a candidate for the office of town representative, the parties agreed that the former should use his influence for the plaintiff's election, and do what he could for that purpose, and that if the plaintiff were elected, that should be a satisfaction of the plaintiff's claim. Nothing was said specifically about the defendant's voting for the plaintiff, but he did vote for him, and would not have done so, or favored his election, but for this agreement. The plaintiff was elected. No actual discharge of the debt was given by the plaintiff after the election. *Held*: That this agreement was entirely void, and constituted no bar to the plaintiff's recovery of his debt. We copy a few sentences from the opinion of Mr Justice Aldis in this case, which combine good law, good sense, and good morals.

"Every voter is bound to use his influence to promote the public good, according to his own honest opinions and convictions of duty. If for money or other personal profit, he agrees to exert his influence against what he believes to be for the

public good, he is corrupt, and the agreement void, even though, in the actual exercise of his influence against his conscience, he resorts to no unlawful means. Such bargains cannot be enforced in law; and the reason why they cannot be enforced is, not merely because they are made criminal acts by statute, or are opposed to the provisions of the constitution, but because of their own inherent turpitude, because they are corrupt and corrupting, because they are destructive to public virtue and the welfare of the community. In republican governments especially, whatever tends to destroy the purity of the elections should be guarded against with the strictest watchfulness, and pursued with the most prompt condemnation by courts and legislators."

G. S. H.

REPORTS OF CASES IN LAW AND EQUITY DETERMINED IN THE SUPREME COURT OF THE STATE OF NEW YORK. By OLIVER L. BARBOUR, LL.D. Vol. 84. Albany: W. C. Little, Law Bookseller, 1862.

The appearance of this volume leads us briefly to describe for the information of our readers residing out of the State of New York, the organization of the Supreme Court, and its method of rendering decisions. The court consists of thirty-three judges, who meet as an entire body once in two years, with the object of establishing and modifying rules of practice. For the purpose of ordinary business, the court is organized by the erection of eight judicial districts, in such a way that arguments in banc are heard before either three or four judges, who are said to hold a *General Term*. The functions of this tribunal are, with a single exception, of an appellate character. Cases appealed from the County and Surrogate Courts are heard here, as well as appeals from certain orders made, and from the judgments rendered in the Supreme Court, either at the Special Terms, or upon verdicts at the Circuit, or upon the reports of referees. The original business of the Court in Law and Equity is transacted before a single judge at Circuit, or at *Special Term*.

This volume of reports contains many interesting and valuable decisions. The reporter has wisely confined himself, as a rule, to the publication of decisions of the court at General Term. There are but three Special Term decisions in the volume, and these may be thought to be of such interest as to warrant an exception in their favor. Cases of this kind should in general be published in the monthly serials. It is to be hoped that the salutary rule thus adopted will be adhered to.

The recent practice, originating in the first judicial district (New York City), of preparing, in most of the cases, brief opinions, is worthy of general imitation. Most of the time spent by judges in composing extended and elaborate opinions would often be far more profitably employed in making

a condensed statement of the reasons for the judgment, and in skilfully distinguishing the case from prior decisions. It may be hoped that the praiseworthy example of the English courts may ultimately be adopted, and those cases only be discussed at length where, on account of the gravity and importance of the question, a full discussion is necessary. The courts ought to assume that the profession is familiar with previous controlling authorities upon the same point, at least when they have been decided in the same State.

The practice of delivering "per curiam" opinions, which seems to be revived in the same district, probably on account of the press of business, is not so praiseworthy. Quite a number of these are reported in this volume. The fact that a particular judge is responsible for the reasons given for a decision, is, to some extent, a guarantee that the subject has been carefully examined. It would seem to be a good general rule that no opinion should be published which has not a voucher for its paternity.

The great variety of subjects discussed in the cases reported, strikingly illustrates the character of the business coming before the New York courts. We have not even space to allude to the principal decisions.

The volume contains in its Appendix eloquent and just tributes, by prominent members of the New York bar, to the memory of Hon. William Kent, son of the late distinguished Chancellor Kent.

Mr. Barbour's experience and skill as a reporter is a guarantee that his portion of the work is well done. We commend the volume to the favorable notice of the profession.

T. W. D.

A TREATISE ON THE SPECIFIC PERFORMANCE OF CONTRACTS, including those of Public Companies. By EDWARD FRY, of Lincoln's Inn, Esq., Barrister-at-Law. SECOND AMERICAN EDITION, with Notes and References to recent English and American Cases. By WM. S. SCHUYLER, Counsellor-at-law. Albany, 1861.

This second American edition of the standard work of Fry is prepared by Mr. Schuyler as his first contribution to the advancement of legal science. The notes of the editor are judicious and comprehensive. The authorities are carefully and extensively examined, and their conclusions appear to be accurately stated. We hope that the encouragement given by the members of the bar to this work may induce the editor to continue in this department of professional labor, in which he promises to be highly successful.

T. W. D.

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COMPETENCY OF WITNESSES.

Jeremy Bentham was certainly a very remarkable man. With all his radicalism, there was so much common sense in his conclusions upon legal reform, that in spite of very strong prejudices they have been gradually making their way both in England and the United States, and in England faster than in the United States. For more than twenty years the professional mind in England may be considered as settled upon the opinion that all arbitrary rules of exclusion of testimony are unjust and inexpedient; and this opinion is not merely founded upon speculation, but created and confirmed by actual experience in the administration of the Law. Practically now in the English courts all persons are competent witnesses, their credibility being left to the jury. In a letter from Sir John Barnard Byles, author of the *Treatise on Bills of Exchange*—and now one of the justices of the Court of Common Pleas—to the writer of this article, March 3, 1860, he says: “You do me the honor to desire my opinion on the practical effect of the English statutes, tending to the abolition of the incompetency of witnesses. As to the removing all disqualification from wit-

nesses *not parties to the cause*, no difference of opinion exists. The change has proved a salutary reform with no attendant evils. As to admitting the parties themselves, and their wives, it has been found (as might have been expected) that on the one hand, the discovery of the truth is greatly facilitated, but that on the other hand, perjury is greatly increased. Yet I think the general opinion is, that the advantages of the change much outweigh the evils. Certainly my experience at the bar and on the bench has led me to that conclusion decidedly, yet I would not extend the capacitation to defendants in criminal cases, nor to inquiries into adultery between man and wife."

England, however, did not jump at once to the conclusion finally reached, but proceeded slowly and cautiously step by step, trying the effect of one change before proceeding to adopt another more extreme and radical. First came the statutes 3 and 4 William IV. c. 42; which enacted, that "in order to render the rejection of witnesses on the ground of interest less frequent, if any witness should be objected to as incompetent, on the ground that the verdict or judgment in the action would be admissible in evidence for or against him, he should nevertheless be examined; but in that case the verdict or judgment should not be admissible for or against him, or any one claiming under him." A much greater change was, however, made by the statute 6 and 7 Vict., c. 85; which removed incompetency by reason of incapacity from crime or on the ground of interest in all persons except the parties to the suit, or the persons whose rights were involved therein, such as the real plaintiff in the fictitious action of ejectment, or any person in whose immediate and individual behalf any action was brought or defended, or the husband or wife of such persons. These provisions having been found to operate beneficially, the statute 14 and 15 Vict., c. 99, was passed, by the first section of which the proviso in the statute 6 and 7 Vict., c. 85, (which excluded all persons directly interested in the suit) was repealed. By the second section, the parties and persons in whose behalf any action, suit, or other proceeding is brought or defended, are made (except as therein excepted) competent and compellable to give evidence on behalf of either or

any of the parties to the suit in any court of justice. The third section of the statute provides that it shall not render any person charged with an offence, competent or compellable to give evidence against himself, nor shall it in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband. The fourth section of the statute further provides, that it shall not apply to any proceeding instituted in consequence of adultery, or to any action for breach of promise of marriage. It was decided soon after it had become law, that the second section of the statute did not render a wife admissible as a witness for or against the husband; and in consequence, the statute 16 and 17 Vict., c. 83, was passed, enacting that the husband and wife of the parties to any suit, or of the person on whose behalf any such proceeding is brought or defended, shall thereafter be competent and compellable to give evidence on behalf of either party or any of the parties. Neither husband nor wife is compellable, however, to disclose any communication made or received during marriage; and neither party is a competent witness in a criminal proceeding, or in any proceeding instituted in consequence of adultery.

Such is a brief synopsis of British legislation upon the subject; and now the important question is, whether some or all of these changes ought not to be introduced into the jurisprudence of the United States. In the State of New York they have been all introduced—parties are competent for themselves, and compellable to testify for the adverse interest. So far the change seems to have worked well in that State.

It would seem the dictate of prudence, that such alterations should be proceeded in gradually and cautiously, as they have been in England. The public should be accustomed to such important changes by degrees. The danger is, that the sudden throwing open the doors of evidence might at once admit too great a crowd, and the profession and community might become disgusted with some of the immediate consequences, and the system be repealed as suddenly as it was enacted, without having had a fair trial.

There are dangers and inconveniences attending it, as well as advantages, and it is only by carefully weighing them all, which can only be the work of time and experience, that a sound estimate of the balance on one side or the other can be arrived at. What should be done at first, and all that should be done, should be to abolish the objection to incompetency, arising from interest or infamy, and if after some years of trial, that change should be found to be a real reform, it will be time enough then to open the door still wider. It may be that a system which is found suitable for England would be found not suitable for this country, and then it would be comparatively easy to retrace our steps. There is the more force in this, as the disclosure of facts in the knowledge of parties may be obtained by means of a bill of discovery, in aid of legal proceedings. Thus practically, a party is *compellable* though not *competent* to testify.

The civil law abounded in restrictions upon the admission of witnesses, but it had one merit not possessed by the common law—that of consistency. Its leading principle was *exclusion*, wherever any possible motive existed, which could operate to produce falsehood. It extended its prohibition to relations (parents and children, by the Roman law—in the French law, collaterals, even to the fourth degree;) to servants and domestics; freedmen and clients; advocates, attorneys, tutors, curators, persons who had been concerned in criminal prosecutions with either party, and finally even those who by eating and drinking with the party by whom they were produced, had thrown themselves open to the suspicion of perjury. But the civil law is a system to which trial by jury is a stranger, and great power and discretion are given to the judge, both in admitting and excluding testimony, and in deciding upon the weight which is due to it.

In England, those barbarous modes of judging of controversies which belonged to the feudal system, the appeal to the special interposition of Providence, the ordeal, the corsned or morsel of execration, and the wager of battle continued long, but were finally superseded by the trial by jury. The wager of law, which lasted the longest, with its jury of compurgators, may have been the

cradle in which this last mode of trial was originally nursed. "He that has waged or given security to make his law, brings with him into court eleven of his neighbors—a custom which we find particularly described so early as in the league between Alfred and Guthrun, the Dane—for by the old Saxon constitution every man's credit in courts of law depended upon the opinion which his neighbors had of his veracity. The defendant, then standing at the end of the bar, is admonished by the judges of the nature and danger of a false oath. And if he still persists, he is to repeat this or the like oath: 'Hear this, ye justices, that I do not owe unto Richard Jones the sum of ten pounds, nor any penny thereof, in manner and form as the said Richard hath declared against me. So help me God.' And, thereupon, his eleven neighbors or compurgators shall avow, upon their oaths, that they believe in their conscience that he saith truth; so that himself must be sworn *de fidelitate*, and the eleven *de credulitate*. It is held, indeed, by later authorities, that fewer than eleven compurgators will do; but Sir Edward Coke is positive that there must be this number, and his opinion not only seems founded upon better authority, but also upon better reason; for as wager of law is equivalent to a verdict in the defendant's favor, it ought to be established by the same or equal testimony, namely, by the oath of *twelve* men. And so, indeed, Glanvil expresses it, *jurabit duodecima manu*: and in 9 Henry III., when a defendant in an action of debt waged his law, it was adjudged by the court *quod defendat se duodecima manu*. Thus, too, in an author of the age of Edward the First, we read *adjudicabitur reus ad legem suam duodecima manu*. And the ancient treatise, entitled *Diversité des Courts*, expressly confirms Sir Edward Coke's opinion." 3 Blackst. Com. 343.

In the first rude state of the trial by jury there are strong grounds for believing that the twelve men drawn from the immediate vicinage of the parties, or rather of the fact to be determined, decided in most instances from their own personal knowledge. Hence arose, as we know, the necessity that a place as well as time should be avowed in pleading every fact. We know, too, that upon one issue, that arising upon the plea of *non est factum*, the wit-

nesses named in the deed, as they usually then were, instead of its being subscribed by them, were required to be summoned as jurors, joined in the inquest, and united in the verdict. "But seeing the witnesses named in a deed shall be joined to the inquest, and shall in some sort join in the verdict, (in which case, if jury and witnesses find the deed that is denied to be the deed of the party, the adverse party is debarred of his attain, because there is more than twelve that affirm the verdict,) it is reason that in that case of joining, such exception shall be taken against the witness as against one of the jury, because he is in the nature of a juror:" 1 Inst. 66. "Trial by jury," says Sir Francis Palgrave, "according to the old English law, was a proceeding essentially different from the modern tribunal still bearing the ancient name, by which it has been replaced, and whatever merits belonged to the original mode of judicial investigation—and they were great and unquestionable, though accompanied by many imperfections—such benefits are not to be exactly identified with the advantages now resulting from the great bulwark of English liberty. Jurymen of the present day are triers of the issue: they are individuals, who found their opinion upon the evidence, whether oral or written, adduced before them; and the verdict delivered by them is their declaration of the judgment which they have formed. But the ancient jurymen were not empannelled to examine into the credibility of the evidence; the question was not discussed and argued before them; they, the jurymen, were the witnesses themselves; and the verdict was substantially the examination of those witnesses, who, of their own knowledge, and without the aid of other testimony, afforded their evidence respecting the facts in question, to the best of their belief. In its primitive form, a trial by jury was, therefore, only a trial by witnesses, and jurymen were distinguished from any other witnesses only by the custom, which imposed upon them the obligation of an oath, and regulated their number, and which prescribed their rank and defined its territorial qualification from whence they obtained their degree and influence in society." Palgr. 248. "If any of those knights, who appeared upon the grand assize, happened to be unacquainted with the truth of the

matter they were rejected and others chosen, until twelve were unanimous. If the jurors professed to know the truth, but dissented from one another in their statements of the fact, the array was 'afforced,' that is to say, other witnesses were sought for, cognisant of the disputed allegation, until twelve at least could be found, who would give testimony, for that number was deemed almost indispensable." Ib. 247. "Trial by jury was an appeal to the knowledge of the country; and the sheriff, in naming his panel, performed his duty by summoning those individuals from amongst the inhabitants of the country who were best acquainted with the points at issue. If, from peculiar circumstances, the witnesses of a fact were previously marked out and known, then they were particularly requested to testify. Thus, when a charter was pleaded, the witnesses named in the attesting clause of the instrument, and who had been present in the folk mote, the shire or manor Court, when the seal was affixed by the donor, were included in the panel; and when a grant had been made by parol the witnesses were sought out by the sheriff and returned upon the jury." Ib. 248.

When the system, thus sketched, came subsequently in the progressive advancement of population and wealth to be of necessity changed, reasons existed of sufficient force to lead to the adoption of exclusionary rules.

It was, in effect, but applying, with some modification, the rules in regard to the competency of jurors, who were, as we have seen, both witnesses and triers, and, therefore, required to be *omni exceptione majores*, to witnesses examined before them. It is certain, however, that from the earliest periods, of which authentic records have reached us, the judges, in whose presence the trial took place, have exercised the power of determining what witnesses shall be heard or excluded, and what evidence shall be submitted to the jury. The jury was usually composed of rude and illiterate men. It was supposed to be advisable to keep from them altogether, not only all which was not clearly relevant to the issue, but every thing coming from sources open to suspicion. Thus grew up a technical and artificial system: and as jurors became more capable of exercising their functions intelligently, the courts

have struggled constantly, so far as they could consistently with the settled principles of such a system, to open the door as wide as possible to the admission of all evidence, calculated to assist in attaining equal justice in the controversy. Hence, so many rules and so many exceptions to every rule: so many chapters where the exceptions cover much broader ground than the rule itself.

Let us consider briefly the practical operation of the simple change proposed of abolishing all objections to the competency of witnesses on the score of infamy and interest.

I. Of infamy. It may be stated briefly, as the result of the cases, that judgment against any person for treason, felony, or the *crimen falsi*, renders him incompetent to testify. The *crimen falsi* includes forgery, perjury, subornation of perjury, and other crimes affecting the administration of justice. It is not competent for a party, when a person is offered as a witness, to give evidence to prove him to have been guilty of such a crime. Even the verdict of a jury, if not followed by judgment, is inadmissible. Nor will even a judgment of the court of a foreign state render him incompetent, though it is admissible, to affect his credit. If a domestic judgment be reversed, though for mere irregularity, it restores his competency, and a pardon completely rehabilitates him, except when the statute, as a part of the punishment, expressly imposes the incapacity.

Surely, the mere statement thus given condemns the rule of exclusion as arbitrary and unreasonable in the highest degree. The worst criminals, if they have no motive to commit perjury, will prefer to tell the truth, and the fact of legal infamy, though very strong evidence, if such motive be shown to exist, that they are wanting in moral principle to resist it, proves nothing, standing alone, even as to the probability of perjury. The judgment should in all cases be admissible to affect credibility—and the very distinction established between a foreign and domestic judgment is a confession of the unreasonableness of the rule of exclusion. It is a distinction without a difference, so far as any reason bearing upon the probability of perjury is concerned. In like manner the reversal of the judgment for error, not being the award of a new

trial on the merits, surely ought not, upon any sound reason, to restore the capacity of the witness. The moral taint is not wiped out by such a reversal. Nor has a pardon any such effect. If, therefore, a heinous crime should be committed, a gross fraud or personal injury perpetrated, or important money transaction take place, and no one present but a legally infamous person, however much his testimony and all the circumstances corroborating its truth, would leave no doubt upon the mind, yet, as he is incompetent to testify, the ends of public and private justice are all prostrated, because he might commit perjury. So may any witness, convicted or unconvicted, and the business of the tribunals is to sift evidence, to weigh its credibility, and to decide upon all the light which can be thrown upon the subject. Had the incapacity been confined to the single case of a conviction of perjury, something plausible might be urged in its favor. But why should treason exclude, and riot not; murder exclude, and assault and battery not; robbery exclude, and embezzlement or cheating not. The list of offences might be gone over, and when you came to settle what crimes do and what do not indicate that want of moral principle which would probably produce perjury, no line of demarcation can possibly be drawn.

II. Interest. The rule is that a present interest in the event of a suit excludes the witness. But it must be a *certain* interest, and then no matter how small it is. If *contingent*, and no matter how slightly contingent, then, without reference to its character or amount, it is an objection to credibility only and not to competency. The only son and heir apparent of a party, who is claiming or defending a valuable estate, is heard without objection. A gentleman of known probity, of high and honorable character, of liberal education, of wealth and station, whose word in the society in which he moves would be taken as readily as his bond, is excluded because he has some trifling pecuniary interest which he is unwilling, and which it would be unreasonable to expect him to release, while a poor wretched dependent of one of the parties, a servant or retainer, who has no other resource but his bounty or favor for his daily bread, is heard without scruple.

A debtor in failing circumstances makes a bill of sale of his goods to a friend. They are levied upon by one of his creditors and the bona fides of the bill of sale is tried between the vendor and the creditor. The legal interest of the debtor is, that the creditor should recover; he is, accordingly, an incompetent witness for him, but competent for the vendee in the bill of sale. Every day's experience proves, that if the rule of exclusion is to be based upon the probabilities of falsehood, the case should be reversed.

It is too low an estimate of human nature to presume that the force of pecuniary interest will generally or even probably lead to the commission of wilful perjury. The character of a man is of more value in the society where he lives, than the amount in controversy in any ordinary case. Men not only know this, but they feel it. The hazard of detection is great, and would be increased by the abolition of the exclusionary rule. In fact, a new and valuable security would thus be gained for the truth of evidence. Pride of character is a more powerful principle of action than love of money, and when it comes to the use of such means as falsehood and perjury, it will instinctively shrink back and betray itself in all but the most abandoned wretches, whose characters, in general, may easily be proved *aliunde*. On the other hand, for one case gained by perjury ninety-nine have been lost on account of the parties being precluded, by artificial rules, from submitting all the facts to the tribunal to which is committed the decision of their cause.

No stronger exposition of the inconvenience of the rule of exclusion could be made than that which would be afforded by a digest of all the cases, *pro* and *con*, which have been decided in this country and England, upon the subject of the incompetency of witnesses arising from interest. How often are collateral issues thus introduced into a cause, and frequently, after years of litigation, the decision reversed in the appellate court, and sent back, because a mistake was committed in the admission or rejection of a witness on an objection of this sort—and how often are other witnesses introduced to prove a witness incompetent, when, if the same rule

was applied to them, which it is not, issue would branch out upon issue, and the decision become complicated beyond measure.

Mr. Bentham here, as in his other opinions, while he has treated the general subject with great, though eccentric ability, in his elaborate work in five volumes on Judicial Evidence, has gone to extremes. He is for the admission of everything, however remote, whether in the witness's own personal knowledge or the mere hearsay of others, even cotemporaneous declarations, letters, and papers of either party tending to throw light upon the subject in dispute. There certainly ought to be some barriers interposed against the manufacture of evidence; at least care should be taken not to hold out encouragement to such practices. Such would inevitably be the consequence of interfering with those most salutary rules, which forbid the introduction of mere hearsay, what may have been said by persons not produced in the face of the court and subjected to cross-examination, and to declarations of the party himself, which may be cunningly framed with an eye to a future lawsuit. As to the question of admitting parties to the suit as competent witnesses, it had better be deferred until the experiment of admitting those affected with infamy or interest is first tried. The rule adopted in New York, which allows a party to call his adversary to the stand, and extract from him, if he can, material facts, and yet leaves him at liberty still to contradict him, seems to be rather a dangerous weapon in the hands of an unscrupulous man. It would be preferable that the pleadings between the parties, confirmed by their respective oaths or affirmations, ascertaining thus what matters of fact were admitted or denied, should be submitted, or, at all events, that the old and tried method by a bill of discovery should be retained as sufficient to answer every valuable purpose.

G. S.

In the Supreme Court of Vermont.—General Term, Nov., 1861.

CLARK COURSER vs. NOAH POWERS.¹

1. A justice of the peace, in an action against himself for an arrest under a warrant issued by him, cannot justify, if he had not, before such arrest, taken the oath of office prescribed by the Constitution of the State.
2. Nor will a subsequent administration of the official oath, on the same day of the arrest, enable him to do so, and the true time when such oath was taken may be shown.
3. Neither will the taking of the official oath under an election to the same office for the previous year enable him to justify; the official oath is only commensurate with the appointment, and covers only the existing term of office.

This was an action for trespass for false imprisonment, and was tried by the Orange County Court, at the June term, 1860. The defendant pleaded not guilty, and gave notice of a special justification.

It appeared that on the 19th day of July, 1859, the grand jurors

¹ We are indebted to the courtesy of Chief Justice Poland for the following very able and satisfactory opinion and review of the cases, upon a question of considerable practical importance to public functionaries. The deference expressed in regard to a doubt of our own, thrown out by way of argument, in the 29 Vermont Reports, is more than full compensation for our loss, in removing both the doubt and difficulty, at the same time. We feel the less disposition to attempt any counter argument, since the decision is evidently in the right direction, in attempting to make something of official oaths, which the practice of public functionaries seems, sometimes, to be doing all it can, wholly to abrogate. My own former doubts, whether the oath of office could any longer be regarded as matter of substance, was evidently based mainly upon the results of practical experience, in seeing the utter uselessness of such a ceremony, which is wholly without any penal sanction, and, in the majority of cases, apparently, quite as void of all religious sanction, binding the conscience of the incumbent. But we admire to find Courts attempting to hold on firmly by the principles upon which the foundations of our Government are laid; even while their house is tumbling about their ears, in consequence of the utter disregard of the spirit and force of those dead forms into which it is certainly a commendable zeal to attempt to infuse some shadow of life and energy. We say, with the full appreciation of the solemnity of our words, God prosper the effort.

I F. R.

of Thetford made complaint to the defendant, as justice of the peace, against the plaintiff, and the defendant, as such justice, thereupon issued his warrant against the defendant, who was arrested thereon about eight o'clock in the morning, and was detained by the officer until near night, when he gave bail and was released.

It appeared that the defendant was duly appointed and commissioned as a justice of the peace for the year commencing December 1, 1858, but had not taken the oath of office when said warrant was issued, but did take such oath about two o'clock in the afternoon of said 19th day of July, 1859.

It also appeared that the defendant held the office of justice of the peace for the previous year, and that within that year he duly took the oath of office.

The defendant objected to the evidence offered by plaintiff to prove at what time the official oath was administered to the defendant on said 19th day of July, 1859, and the Court received the same, subject to such objection.

It was thereupon agreed by the parties that the Court should assess the plaintiff's damages, and that, if the Supreme Court should decide that such evidence was admissible, and that upon the whole case the plaintiff was entitled to recover, the plaintiff should recover final judgment for such damages in the Supreme Court.

The Court assessed the plaintiff's damages at five dollars.

The County Court gave judgment for the defendant.

The plaintiff filed his exceptions thereto, and brought the case into this Court.

The case was argued by

Howard and Collins, for plaintiff, and by

C. W. Clarke, for the defendant.

The opinion of the Court was delivered by

POLAND, Ch. J.—The question presented by this case is, whether a justice of the peace can justify an arrest upon a warrant, issued and signed by him, before he has taken the official oath required by the Constitution of the State. The defendant insists that it was not necessary that he should take such official oath in order to

justify under the warrant; that this requirement of the constitution is merely directory.

If this cannot be maintained, then the defendant contends that the oath taken by him, as a justice of the peace for the previous year, when he held the office, extended over, and covered the succeeding year, when the warrant was issued; and also, that the administration of the oath subsequent to the arrest of the plaintiff, on his warrant, had relation back, and covered the whole of that day, upon the doctrine that in law there are no fractions of a day.

Upon the two grounds last named the Court have experienced no difficulty. Where a person is elected, or appointed to an office for a fixed term, and takes the oath of office, the oath is commensurate with the appointment, and covers that official term, and no more. If the same person be re-appointed or re-elected, he holds his office under the new appointment or election, and must be inducted into office in the same manner as at the first. This was held to be the law in relation to official bonds, in the case of *Orange County Bank vs. Mann et al.*, on the present circuit. The doubt in that case arose from the general language made use of, which, without any violence, might include the performance of the same duties under another election. Nor do we regard this as a case in which the rule, that in law there are no fractions of a day, properly applies. This rule has in general been held applicable to transactions of a public character, such as legislative acts, or public laws, or such judicial proceedings as are matters of record, when parol testimony would be inadmissible to prove any thing in relation to them, and if it were received, and an issue of fact allowed to be made in every case when they came in question, would lead to uncertainty and confusion. Hence, as a rule of policy, as well as of law, the day on which such act was done, as shown by the record, is either wholly included or excluded from its operation. But this doctrine is never applied in mere private transactions, involving rights between individuals, either of property, or for an injury to the person of one by the act of another; there the true time, when an act was done, or a right or authority acquired by one, may always be shown. We do not regard the taking of the official oath

by the defendant as being an act of that public character, coming within the rule, and if the arrest of the plaintiff, upon the defendant's warrant, was an illegal and unjustifiable act, as against the defendant, if he had not taken the oath when the arrest was made, we think it was admissible for the defendant to prove when such oath was taken.

The whole subject, as to when this rule of law applies, is thoroughly examined and discussed by that eminent jurist, the late Judge Prentiss, in a case before him in the District Court, reported in the 20th Vermont Reports, 658, and we refer to that opinion as embodying the true view of the law on the subject.

We are, therefore, brought to the direct question, whether the defendant can justify the arrest of the plaintiff, upon his warrant, he not having taken the official oath. The Constitution of the State, second part, section 29, provides that every officer, whether judicial, executive, or military, in authority under this State, before he enters upon the execution of his office, shall take and subscribe the oath of allegiance to the State, and the oath of office, and gives the form in which each shall be administered. The defendant having been duly elected and commissioned as a justice of the peace, held the office under such an apparent title, that if he assumed to act as such, he was undoubtedly a justice *de facto*; so that as to third persons his acts must be regarded as legal, and could not be brought in question. But here the defendant, himself, is called upon in an action to justify an arrest made by his command, and all the cases agree that in such case the officer must show every thing done necessary not only to his legal election or appointment, but also to his legal induction into office.

The reason for this distinction is obvious, and founded in good sense and substantial justice. Third persons, who are called upon to act under the authority of public officers, or who have occasion to avail themselves of the official aid of such officers, are not supposed to know, or to have the means of readily ascertaining, whether such officers have complied with all the necessary legal requirements to qualify them to perform their duties, but if such officer has been legally elected or appointed, and is in the per-

formance of the duties of his office, they have a right to presume that he has taken all the necessary steps to his due qualification.

But the officer himself has no such immunity, because there is no occasion for it, as he must always know whether he has complied with the requirements of the law in his induction or qualification to the office.

This question has been before this Court to some extent in former cases, though not expressly and directly adjudicated. In *Adams vs. Jackson*, 2 Aik. 145, the plaintiff claimed title to the land in question, under a deed from a constable who had sold the land for taxes.

The record was produced of the election of the constable, upon which was the word *sworn*. It was considered doubtful whether this was sufficient evidence that the constable was legally sworn, but the Court held that the constable being in office under a valid election, he was *de facto* an officer, and the legality of his acts could not be called in question between third persons. The distinction between officers *de facto*, whose official acts bind third persons, and officers *de jure*, who may themselves justify their official acts, is very clearly defined by Skinner, Ch. J., and the whole argument of the opinion proceeds upon the ground, that in order to make an officer *de jure* he must have taken the official oath. *Andrews vs. Chase*, 5 Vt. 409, was an action of trespass against a highway surveyor for property taken and sold for the payment of taxes against the plaintiff.

The defendant was sworn before a justice of the peace on a day subsequent to the meeting at which he was elected. The plaintiff claimed that it should appear by the record that he was sworn, and that the oath should have been administered by the town clerk, or one of the selectmen. The Court held that the plaintiff was properly sworn, and that it need not appear of record. In this case also, it is rather assumed than decided, that unless the defendant had been properly sworn, he could not justify his act of taking the plaintiff's property.

In *Putnam vs. Dutton*, 8 Vt. 396, it was objected to an auditor's report that it did not appear therefrom that the auditor was sworn,

but proof was made in Court that he was in fact sworn. The Court decided that it need not appear from the report that the auditor was sworn, and that unless the contrary was proved, it would be presumed he was, as the statute then required it. In the opinion of the Court, Redfield, J., says: "It is true the statute requires the auditor to be sworn, and if he proceeds without being sworn, and this is made to appear in the proper mode, the report could not be accepted."

In *McGregor vs. Balch et al.*, 14 Vt. 428, the question was whether the official acts of a justice of the peace, who also held the office of deputy postmaster, were valid between third persons. Williams, Ch. J., who delivered the judgment of the Court, discusses at length the distinction between an officer *de facto*, whose acts are valid, as respects third persons, but invalid, as respects himself, and an officer *de jure*, who can himself justify, and cites with approbation the case in 5th Mass., where it was held that an officer not duly sworn could not justify his acts in an action against himself. The same question has been before the Courts in other States, and by implication, at least, decided.

Colburn vs. Ellis et al., 5 Mass. 427, was an action for an assault and false imprisonment; the defendants justified, as parish assessors, and the point directly decided by the Court was, that the record of the official oath of the defendants, did not show that they were properly sworn into office, and judgment was rendered for the plaintiff. No question was made, as appears by the case, either by Court or counsel, but that this was necessary to enable defendants to justify the arrest of the plaintiff.

In *Wells et al. vs. Battelle et al.*, 11 Mass. 477, the direct point decided was, as to the power of a parish clerk to amend his record, so as to show that the defendants were duly sworn as assessors.

In *Bucknam vs. Ruggles*, 15 Mass. 180, it was held that a levy of an execution upon real estate, made by a deputy sheriff, who had not been duly sworn as such, was valid between the debtor and creditor, upon the ground that he was a good officer *de facto*. Both these cases, by implication, clearly recognise the doctrine, that to make a public officer, such *de jure*, so that he can protect

himself under his official shield, he must take the official oath, when one is required by law.

In *People vs. Collins*, 7 Johns. 549, it was held that the acts of commissioners of highways, who had not been sworn into office, were valid as to third persons, on the ground they were officers *de facto*.

In New Hampshire the question seems to have been more directly decided. The Constitution of that State, is very similar to our own in this respect, except, that it does not apply to town officers. But by statute in that State, all town officers, before they enter upon the performance of official duties, are required to take the official oath.

In *Johnston vs. Wilson et al.*, 2 N. H. 202, it was decided that in an action against a town collector for property seized for taxes, the defendant could not justify the taking unless he had been duly sworn into office. The arguments of the counsel are not given, so that it cannot be known what ground was claimed, but the point is discussed with the usual fulness of learning that characterized Judge Woodbury, and is directly decided.

In *Proprietors of Cardigan vs. Page*, 6 N. H. 182, it was decided that a sale of lands by a town collector for taxes was void, unless it appeared by the record that such collector had taken the oath prescribed by law. It will be noticed that under a similar state of facts, this Court held, in *Adams vs. Jackson*, *ubi sup.*, that the acts of the collector were valid as an officer *de facto*.

In a subsequent case, *Blake vs. Sturtevant et al.*, 12 N. H. 567, Upham, J., speaking of this case, says: "This case is now qualified in those instances where third persons are interested, where it is merely necessary to show an officer *de facto*, but the rule is correctly laid down in all cases where an individual must be shown to be an officer *de jure*." The last named case was an action against the selectmen of Keene for causing the plaintiff's oxen to be sold for taxes, and it was held that the defendants could not justify their official acts, without proving that they were duly qualified by taking the oath prescribed by law, that without this they were not officers *de jure*.

In *Cavis vs. Robinson*, 9 N. H. 524, it was decided that a collector of taxes duly elected by the town, could not justify a taking of property for taxes, unless he had duly taken the oath of office. The same principle was again affirmed in *Ainsworth vs. Dean*, 1 Fost. 400, and in several other cases in New Hampshire. In Maryland their State Constitution has a provision in nearly the same language as our own, requiring all officers to take and subscribe the oath of office before they enter upon its duties.

In *Thomas vs. Owens*, 4 Maryland, 189, the question arose in the following form: The plaintiff was elected controller of the treasury on the 5th of November, 1851, and duly commissioned, but did not take the official oath until the 24th of February, 1852. The plaintiff claimed that his salary commenced at the time of his election and date of his commission. The defendant, who was treasurer of the State, refused to pay, except from the time the plaintiff took the oath of office, and the question before the Court was, which was right. The Court decided in favor of the defendant. Le Grand, Ch. J., said, "Now we hold that the late controller could not be considered as an officer until he was qualified by taking the oath prescribed by the fourth section of the first article. After his election and commission by the Governor, he had the right to invest himself with the powers and entitle himself to the salary, by qualifying in the manner pointed out by the constitution, but until he actually did qualify, he was no more controller than any other citizen, his qualification being an indispensable prerequisite to his investiture with the authority and responsibilities of the office." We have found no decision in conflict with the cases above referred to.

In considering the effect of this provision of the constitution, it is proper to refer to the common law on the subject, and the importance which had ever been attached to oaths in England, from whence our own law is mainly derived. By the common law all officers of justice were bound to take an oath for the due execution of justice; though it was held that if such *promissory* oath were broken, the violators could not be punished for perjury, but

should be punished by a severe fine: *Jac. Law Dictionary, title Oath*, Wood's Inst. 412.

The acts of Parliament requiring oaths of every person appointed to perform any office, trust, or duty, are very numerous, and not only for such purposes, but oaths applying to particular classes, and sometimes to the whole people, as the test oaths, oath of supremacy, &c., important events, not only in the legal, but also in the political history of that Government. It was ever regarded as an important guaranty for the due performance of any public office or duty, that the person to perform it should, in a public and solemn manner, call God to witness his promise to be just and faithful in the administration of it.

Such being the estimation of the importance and value of oaths, when our Constitution was formed, we cannot suppose that our ancestors, in making this requirement and express provision of the fundamental law of the State, intended it to be merely directory, and to be obeyed or not, at the pleasure of her public servants. Their idea was similar, as we think, to that expressed by a very ancient English writer, who says, "Anciently, at the end of a legal oath was added, *so help me God at his holy dome*, i. e., judgment, and our ancestors would not believe that a man could be so wicked as to call God to witness any thing which was not true, but that if any one should be perjured, he must continually expect that God would be the revenger." We are of opinion, therefore, that the official oath required by the constitution is a necessary requisite to the legal induction into office, and that any person who has been legally elected or appointed to such office, and assumes its duties without taking the oath, cannot be regarded as an officer *de jure*, and cannot, therefore, in an action against himself justify under his official character. This view, we believe, is not only in accordance with principle and authority, but also in harmony with the general understanding and practice of the people, of the legal profession, and judicial tribunals of the State ever since the constitution was formed. We have examined this subject with the more care, in consequence of an opinion advanced by a late distinguished judge of this Court, in giving the judgment of

the Court in *Taylor vs. Nichols et al.*, 29 Vt. 104, to the effect that this requirement of the official oath is mere form, and should be regarded as directory merely. The action was on a receipt given by the defendants to the plaintiff as sheriff, and the defence was that the sheriff never gave any legal recognisance as such, and therefore never became legally sheriff. The Court inclined to consider the recognisance itself valid, but held, that whether so or not, as the plaintiff was a good officer *de facto*, and the attachment, therefore, legal between the parties, and as this suit was merely to enforce the attachment for the benefit of the creditor, the action could be maintained. It does not appear from the case that any question arose as to the plaintiff having taken the oath of office. and what was said on this point by the learned judge was merely by way of illustration, and probably without particular examination of the precise point involved in his observation.

The judgment of the County Court is reversed, and judgment rendered for the plaintiff for the damages assessed by the County Court.

In the District Court of the United States for the District of Wisconsin.

THE UNITED STATES vs. THE PROPELLER "SUN."

1. A vessel propelled in whole or in part by steam, is not liable to a penalty for transporting goods, wares and merchandise, without inspection of the hull and boilers, under the act of Congress of August 30, 1852. The penalty is alone for transporting passengers.
 2. An answer to a libel of information must be full and explicit to each article. It must deny the charges, or confess and avoid them by proper averments of facts.
- Quere.*—Can a vessel belonging at the port of Buffalo, where inspectors are located by the act of August 30, 1852, be inspected at the port of Chicago?

The opinion of the Court was delivered by

MILLER, J.—By the information this propeller was seized by the Collector at the port of Milwaukee, on the 6th of October, 1861, for the following causes:

1st. That on the 20th of September, 1861, the propeller did transport goods and passengers from Milwaukee to Goderich, in Canada, without first having complied with an act of Congress, approved July 7, 1838, entitled "an act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam," and the act of August 30, 1852, entitled "an act to amend an act," &c., in this, that the hull of said propeller had not been inspected pursuant to the provisions of the ninth section of the last act within one year prior to the 20th of September, 1861. For each of said violations a penalty of five hundred dollars is claimed.

2d. That on the 28th of September, 1861, the vessel did transport goods and passengers from the port of Goderich to the port of Milwaukee, without inspection of her boilers, and for each violation of the act a penalty of five hundred dollars is claimed.

Respondent answers, that the vessel was licensed at Buffalo, and was employed in the business of commerce and navigation between the ports of Chicago and Milwaukee, on lake Michigan, and the port of Goderich, in Canada. That the hull and boilers of the vessel were inspected at the port of Chicago, and certificate issued on the 19th of September, 1860, and on the 8th of September, 1861, before the certificate had expired, respondent caused an application to be made to the inspectors at Chicago, for the inspection of the hull and boilers of the propeller; and on the 28th of the same month a second application was made.

At the time of the first application the inspectors were absent from Chicago, and at the time of making the second application the inspectors had not the pumps and necessary machinery for making the inspection, and that one of the inspectors was then absent. The propeller was inspected at Chicago on the 8th of October following, when a certificate was issued by the inspectors; and there are no local inspectors on lakes Huron and Michigan.

To the answer, the District Attorney filed exceptions: That respondent had not fully and distinctly answered the libel, and the matters set forth are immaterial and irrelevant.

Before considering the exceptions, it may be proper to inquire

what the respondent should answer to. The libel is intended to charge that the propeller is liable to a penalty of five hundred dollars, for carrying goods, &c., and a like penalty for carrying passengers from Milwaukee to Goderich, and similar penalties for carrying goods and passengers from Goderich to Milwaukee, without having been first inspected, as required by the acts of July 7, 1838, and August 30, 1852.

The act of July 7, 1838, 5 Statutes, 304, entitled "an act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam," directs in section 2: "that it shall not be lawful for the owner, master, or captain of any steamboat, or vessel propelled in whole or in part by steam, to transport any goods, wares or merchandise, or passengers, in or upon the bays, lakes, rivers, or other navigable waters of the United States, without having first obtained from the proper officer a license under the existing laws, and without having complied with the conditions imposed by this act; and for each violation of this section the owners of said vessel shall forfeit and pay to the United States the sum of five hundred dollars, the one-half to the use of the informer, and for which sum or sums the steamboat or vessel so engaged shall be liable, and may be seized and proceeded against summarily, by way of libel, in any District Court of the United States having jurisdiction of the offence." The act then directs the appointment and duties of inspectors of hulls and boilers of such boats and vessels.

The act approved August 30, 1852, 10 Statutes, 61, is an act to amend the act of July, 1838. The first section directs: "That no license, registry, or enrolment under the provisions of this or the act to which this is an amendment, shall be granted, or other papers issued by any collector to any vessel propelled in whole or in part by steam, and carrying passengers, until he shall have satisfactory evidence that all the provisions of this act have been fully complied with; and if any such vessel shall be navigated, with passengers on board, without complying with the terms of this act, the owners thereof and the vessel itself shall be subject to the penalties contained in the second section of the act to which

this is an amendment." The whole object and scope of the last act was to provide for the better security of the lives of passengers, and it provides a full and perfect system for the inspection of the hulls and boilers of vessels propelled in whole or in part by steam, and carrying passengers. By the section of the act above quoted, the penalty prescribed in the second section of the act of July, 1838, is continued as to vessels navigated with passengers on board, without complying with the terms of the act in regard to inspection. The penalty in the act of July, 1838, for transporting goods, wares, and merchandise on vessels not inspected, is not embraced in the act of August, 1852; and by this last act all parts of laws heretofore passed, which are suspended by, or inconsistent with the act, are repealed. That provision in the act of July, 1838, was outside of the object of the act, and in the subsequent act it is entirely omitted. In this respect the two acts are inconsistent, and the provision of the last act must prevail. This is a penal statute, and it must be construed literally. The respondent is not required to answer that part of the libel, of information claiming a penalty for transporting on this propeller, goods, wares, or merchandise, without previous inspection of her hull and boilers.

The exceptions to the answer will have to be allowed.

The answer neither denies nor confesses the charges. The respondent must fully and explicitly answer the several articles of the libel. He must deny the several articles, or confess and avoid them by a proper allegation of facts.

By the answer, the propeller was licensed at the port of Buffalo Creek, on the 5th of April, 1861. There is no allegation that since then she has been transferred to any other port. It is also alleged that her hull and boilers were inspected at the port of Chicago, on the 19th of September, 1860; and that before the certificate expired, and again on the 28th of September, 1861, application was made to the inspectors at Chicago for inspection, which was not done for the reasons stated. It is not alleged that the application was in writing, as the law requires; nor does it appear that the inspectors at Chicago had any official right to

perform the duty. By section 9 of the act of August, 1852, inspectors were directed to be appointed at Buffalo, which was the port where this propeller belonged. The inspectors are to perform the services required of them by the act, within the respective districts for which they shall be appointed; and by the twelfth specification of the section, the Board, when thereto requested, shall inspect steamers belonging to districts where no such Board is established. If this propeller belongs at the port of Buffalo Creek, it is questionable whether a certificate of inspection at the port of Chicago should be adjudged a compliance with the law. But this subject can be more maturely examined hereafter.

THE UNITED STATES vs. THE STEAMBOAT "SENECA."

A steamboat employed in transporting passengers between ports in the same State. is not liable to a penalty for not having the hull and boilers inspected under the act of Congress of August 30, 1852, and the District Court has no jurisdiction.

The opinion of the Court was delivered by

MILLER, J.—It is propounded in the information, that at the port of Superior, on Lake Superior, in this District, the Collector of Customs for the Collection District of Michilimackinac, did seize said steamboat and now holds her in his custody within this District, as forfeited to the United States for carrying and transporting goods and passengers between the ports of Superior and Bayfield, on Lake Superior, within this State, without license and the inspection of her hull and boilers required by the Acts of Congress of July 7th, 1838, and August 30th, 1852, and in violation of those acts.

By the information, this steamboat was engaged exclusively in transporting passengers and property between the ports mentioned in the information, which are located on Lake Superior, and within the State of Wisconsin.

It is well settled that the constitutional power of Congress "to

regulate commerce with foreign nations and among the several States," does not embrace the purely internal commerce of a State: *Gibbons vs. Ogden*, 9 Wheat. 1; *Brooks vs. The Steamboat Peytona*, 2 Law Monthly, 518; *Whitaker vs. The Steamboat Fred. Lawrence*, Id. 520; *The New Jersey Steam Navigation Company vs. The Merchants' Bank*, 6 Howard, 344; *Allen vs. Newbury*, 21 Howard, 244.

The act of Congress of July, 1838, provides that it shall not be lawful for the owner, master or captain of any steamboat or vessel propelled in whole or in part by steam, to transport goods, &c., or passengers, in or upon the bays, lakes, rivers, or other navigable waters of the United States, without having first obtained from the proper officer a license under existing laws and without the inspection required, under a penalty of five hundred dollars for each violation of the act. And the act of August, 1852, continues this penalty, for transporting or carrying passengers without inspection. The terms of the act embrace the local employment of this steamboat; but the act must be construed according to the constitutional provision as expounded by judicial authority. The steamboat was employed between places within this State. The contract of affreightment with the steamboat *Fashion*, in *Allen vs. Newbury*, was for the transportation of leather on Lake Michigan between ports in this State. The contract with the steamboat *Fred. Lawrence*, was for a passage on the Mississippi river, between ports in this State. The license required by the act is for carrying on the coasting trade, and the inspection is for the security of the lives of passengers on board of steam vessels. It is evidently an act for the regulation of commerce under the constitution. From the decisions referred to, it is apparent that this Court in Admiralty would not have jurisdiction of this steamboat, while engaged as propounded in the information. And it appears very plainly that jurisdiction cannot be maintained of this information, for the reason that the steamboat is not alleged to be employed in the foreign or coasting trade, but was running between ports and places within the State of Wisconsin; and she was exclusively within and subject to State regulations and control. The District

Court for the State of Missouri, in *The United States vs. The Steamboat James Monroe*, and *The United States vs. The Steam Ferryboat Pope*, 1 Newbury's Reports, 241 and 256, holds the same opinion.

The information will be dismissed for want of jurisdiction.

In the Supreme Court of Pennsylvania, 1862.

ALEXANDER DEAN AND WIFE vs. DANIEL NEGLEY AND STERLEY CUTHBERT.

1. In an issue to try the validity of a will, which was contested on the ground of undue influence, want of mental capacity, coercion, and on other grounds, it appeared that, by the alleged will, the testator gave a trifling sum to his only legitimate child, and then bequeathed the residue of his property to the children of a woman with whom he was alleged to have been living in adulterous intercourse. There was no direct evidence given or offered of want of mental capacity at the time, or of any actual coercion or influence exerted in the testator as respects the testamentary act; but it was proposed to prove the fact of this adulterous intercourse, which was of long continuance, and which had obliged his wife and daughter to abandon his house, and that the alleged adulteress was a woman of vigorous character, and exerted a despotic influence over his actions generally, in connection with the fact that he was suffering from a painful disease, to relieve which he took opiates, as tending to show undue influence generally. *Held*, that the evidence was admissible for this purpose, on the ground that the relation being an unlawful one, the influence which sprang from it must also be unlawful.
- 2 *Seemle*, by LOWRIE, C. J., that this would be a presumption of law.

Error to the Court of Common Pleas of Allegheny county.

This was an issue of *devisavit vel non*, directed by the Register's Court of Allegheny County, and tried in the Court below, to determine the validity of a paper purporting to be the last will and testament of one William Johnston, who died on the 4th of December, 1860. By this paper, which bore date the 23d day of December, 1857, the alleged testator, after providing for the payment of debts and legacies in the usual way, and for the erection of a monument to his memory, bequeathed to his only child and daughter, Elizabeth, then Elizabeth Dean, (plaintiff in error,) the sum of \$20. He then gave and bequeathed the residue of his

estate to Sarah Bell Bolton, Eliza Bolton, Olivia Bolton, Josephine Bolton, and Annie Bolton, daughters of John and Rosana Bolton, in the manner therein set forth, in token of his friendship for them. And he appointed the defendants in error, Daniel Negley and Sterley Cuthbert, to be his executors.

The paper, on its face, was duly executed as a will. To its admission as such, a *caveat* was filed by the plaintiffs in error on the following grounds:

That the testator was of non-sane mind and memory at the time of the execution of the alleged will; that it was procured by fraud, coercion, or undue influence; that, at the time of executing it he labored under a monomania, weakness, and delusion in respect to his heir-at-law, which had an undue influence on his judgment; and that he was so importuned by parties having an interest in depriving his relatives of his estate, as to amount to coercion.

On the trial of the issue, the executors, in support of the will, produced the subscribing witnesses, who testified to its due execution, and very distinctly to the sanity of the testator at the time.

On behalf of the contestants, after the proof of the marriage of the testator to Mrs. Jerusha Butler, a widow, the mother of Mrs. Elizabeth Dean, the testator, only legitimate child and heir, Dr. A. H. Gross, the attending physician, was called as a witness, and testified that the testator had for ten years been affected by cancer of the eye and nose, of which disease he at last died. The disease had been, as usual, treated with opiates. He could not rest without them. The habitual use of opium is always detrimental to the mind. The use of opium was commenced in the latter part of 1857—at first in moderate doses, and afterwards constantly.

The testator boarded for some time with Mrs. Bolton. She nursed him, and undoubtedly had a great influence over him when nursing him. “She was,” said the witness, “a vigorous, *managing* kind of woman, such as could manage a man pretty well. A person under the influence of opiates and a painful disease is more liable to be subject to the influence of his nurse.

“ I knew Johnston well ; I don't think man or woman could control him past his pleasure when he was not under the influence of opium or suffering. When not under pain or opiates, he had a decided will of his own ; when under opiates or pain, he was more liable to influences. In 1857 and 1858, his use of opiates was very moderate. When not under the paroxysm of pain or use of opiates, in 1858 or 1859, he was of as sound mind as any man. I never knew of any defect of mind till lately, in 1860.

“ Mrs. Bolton was a good nurse ; Johnston was very well nursed.”

The contestant then offered to prove that the testator had been living in an adulterous connection with Mrs. Bolton, the mother of the residuary devisees, for many years ; that the connection, which began about sixteen years after his marriage, was so notorious and conducted in such a manner as to compel Mrs. Johnson, with her daughter, (then about fourteen years old,) to leave his house ; and that after the separation, his illicit intercourse with Mrs. Bolton continued uninterruptedly till his death.

That the opiates which the testator had been obliged to take on account of his disease, had weakened his mind, and made him more or less subject to the control of those about him, and particularly to that of Mrs. Bolton, in his business transactions and otherwise.

That “ Mrs. Bolton was a woman of masculine vigor and understanding, and exercised a despotic influence over Johnston in relation to many of his business transactions, interfering with his contracts where they did not suit her views, and inducing him to annul or alter them according to her pleasure and dictation, and this both before and after the making of the will. That Mrs. Dean, both before and after the making of the will, visited her father, with the expectation of having confidential and private conversation with him, and upon every such occasion Mrs. Bolton, or some member of her family, remained in her room, so that no such intercourse could take place.

“ That Mrs. Dean was always anxious and ready to go and nurse her father during his illness, and to reside with him or have him

reside with her, on condition that he would sever his connection with Mrs. Bolton, of which he was fully aware, and had expressed himself in terms of affection for her, but still refused to sever his connection with Mrs. Bolton."

And that the only source and basis of the testator's fortune was the income derived from his wife's estate, which he had saved and invested.

The offer of this evidence was made in connection with the disposition of the will, for the purpose of showing undue influence by Mrs. Bolton in procuring the execution of the will.

To this offer the proponents of the will objected (except so far as it was proposed merely to show the extent of the testator's property, and the condition of his mind from disease and the application of opiates) for the following reasons, viz.: because,

1. The evidence offered did not tend to throw any light on the testamentary capacity of the testator at the time of making his will.

2. That the fact of alleged adultery did not tend to show undue influence by Mrs. Bolton over the testator at the time of making his will.

3. The acts, declaration, or conduct of Mrs. Bolton, she not being interested in law in establishing the will, were not evidence.

4. The offer did not show, or tend to show, undue influence by any one in setting up the will.

The learned judge overruled the offer for the foregoing reasons, and also because the contestants' counsel did not propose to follow it up by testimony tending to show that fraud, deceit, coercion, or other undue influences were actually used by Mrs. Bolton, or that the will was made under such influences.

The contestants, then, in connection with their previous offer, proposed to prove that Mrs. Bolton did, within a few days prior to the date of the will, use undue influence on the mind of the testator, so as to induce him to annul a lease that he had made, and to assert as a reason for so doing, that he was out of his mind at the time of entering into the same.

This additional offer was also overruled by the learned judge,

because it was not proposed to show thereby that her influence was exerted in any way to procure him to make the alleged will, and that it could not be inferred that the will was made under undue influence, from the fact that Mrs. Bolton had great influence with the testator, and used it for other purposes.

The jury having found for the will, these rulings were assigned for error here.

Charles Shaler and Bruce & Negley, for plaintiff in error.

Marshall & Brown, for defendants in error.

The opinion of the Court was delivered by

LOWRIE, C. J.—The will of a man who has testamentary capacity cannot be avoided merely because it is unaccountably contrary to the common sense of the country. His will, if not contrary to law, stands for the law of descent of *his* property, whether his reasons for it be good or bad, if they be indeed his own, uninduced by unlawful influence from others. Lawful influence, such as that arising from legitimate or social relations, must be allowed to produce its natural results, even in influencing last wills. However great the influence thus generated may be, it has no taint of unlawfulness in it; and there can be no presumption of its actual unlawful exercise merely from the fact that it is known to have existed, and that it has manifestly operated on the testator's mind as a reason for his testamentary dispositions. Such influences are naturally very unequal, and naturally productive of inequalities in testamentary dispositions; and as they are also lawful in general, and the law cannot criticise and measure them so as to attribute to them their proper effects, no will can be condemned because the existence of such an influence can be proved, and because the will contains in itself proof of its effect. It is only when such influence is unduly exerted over the very act of devising, so as to prevent the will from being truly the act of the testator's, that the law condemns it as a vicious element of the testamentary act; so the law always speaks of the natural influence arising out of legitimate relations. But we should do violence to the morality of the law, and therefore to law itself, if we should apply this rule to unlawful, as well as to lawful

relations; for we should thereby make them both equal in this regard at least, which is contrary to their very nature. If the law always suspects, and inexorably condemns undue influence, and presumes it from the nature of the transaction, in the legitimate relations of attorney, guardian, and trustee, where such persons seem to go beyond their legitimate functions, and work for their own advantage, how much more ought it to deal sternly with unlawful relations, where they are, in their nature, relations of influence over the kind of act that is under investigation. In their legitimate operations those positions of influence are respected; but where apparently used to obtain selfish advantages, they are regarded with deep suspicion; and it would be strange if unlawful relations should be more favorably regarded.

And the voice of the law on this general subject is distinct and emphatic, transmitted through many generations, and embodied in many Latin maxims, of which the following are some: *Nemo commodum capit de injuria sua. Nemo ex proprio dolo consequitur actionem. Frustra legis auxilium petit, qui in legem committit. Pacta, quæ contra bonos mores sunt, nullam vim habent. Ex dolo malo, ex malificio, ex turpi causa, ex pacto illicito, non oritur actio. Ex injuria non oritur jus. Pacta, quæ turpem causam habent, non sunt observanda. In odium spoliatoris, omnia præsumuntur.* All of which may be summed up in one sentence—No one shall derive any profit through the law by the influence of an unlawful act or relation.

The ordinary influence of a lawful relation must be lawful, even where it affects testamentary dispositions, for this is its natural tendency. The natural and ordinary influence of an unlawful relation must be unlawful, in so far as it affects testamentary dispositions favorably to the unlawful relation and unfavorably to the lawful heirs. Ordinary influence may be inferred in both cases, where the nature of the will seems to imply it; but in the former case it is right because the relation is lawful, and in the latter it may be condemned, together with all its effect, because the relation is unlawful.

It is not inconsistent with this, that it has been decided that the

devise of a wife to her second husband was not affected by the fact that *she* knew she had a husband living at the time of her second marriage, even though the second husband heard of it before her death; for this shows no conscious transgression of law by him in marrying her, and her heirs could not set up her fraud on him as a reason for avoiding her will: 8 Harris, 329.

There can be no doubt that a long-continued relation of adulterous intercourse is a relation of great mutual influence of each over the mind and person and property of the other. History abounds with proofs of it, and it requires no very long life or very close observation of persons around us in order to reveal the fact. Our divorce law of 1815 shows its abhorrence of the crime and its influence, by forbidding any one, divorced for adultery, from marrying his or her *particeps criminis* while the injured consort is living, and by disabling a woman thus divorced from devising or conveying her property, if she cohabit with her paramour. And the Canon Law, though it allowed children born before marriage, to be legitimized by a subsequent marriage, refused this privilege to children born of adulterous intercourse, and did not allow even a devise in their favor from the faulty parent.

If, then, there was such a relation between the testator and Mrs. Bolton, at the time of the making of this will, as was offered to be proved, we think that that fact, taken in connection with the devise to Mrs. Bolton's daughters, is evidence of an undue influence exerted by her over the testator and affecting the dispositions of his will, and that it may justify a verdict against the validity of the will. I have, myself, thought that it raised a *presumption of law* of undue influence, but we do not so decide, but leave it as a question of fact merely. We are, therefore, of the opinion that the evidence offered ought to have been received.

Judgment reversed and a new trial awarded.

*In the New York Court of Appeals.*BENJAMIN GOULD, RESP., vs. THE TOWN OF STERLING, APPEL'T.¹

By the provisions of a statute, the Supervisor and Commissioners of the town of S. were authorized to borrow a sum of money, not exceeding twenty-five thousand dollars, upon the credit of the town, and to execute therefor, under their official signatures, a bond or bonds. They were to have no power to do any of the acts authorized by the statute until the written assent of two-thirds of the resident tax-payers was obtained and filed in the office of the County Clerk. The money, when obtained, was directed to be paid over to the president and directors of a railroad company then about to be organized for the construction of a railroad through the town. Instead of borrowing the money, the Supervisor and Commissioners executed and delivered the bonds directly to the railroad company in payment for stock for which they were authorized to subscribe, and these were subsequently sold by the company at a discount. Each of the bonds, upon which the plaintiff brought his action, stated that the requisite consent of the tax-payers had been obtained and properly filed, with a certificate of the County Clerk that a paper, purporting to be the written assent, &c., had been filed in his office. The statute did not authorize the giving of this certificate, nor did it prescribe in what method the written assent should be proved. No evidence was offered that the consent had been given other than what is above stated. The bonds on which the suit was brought were payable to bearer, and the plaintiff was a holder for value.

- 1 *Held*, that the power to borrow was not properly complied with.
2. That the provision requiring the assent of the tax-payers, as evidenced, was a condition precedent to the issue of the bonds, and an indispensable prerequisite to their validity.
3. That, in the absence of all direct proof that the written assent had been obtained, the town was not estopped by the acts of its agents, who had issued bonds asserting upon their face that it had been, even though it had, for a considerable period, acquiesced in their acts. Such consent should have been proved affirmatively. The case does not come within the rule that when a power is conferred, if the agent does an act which is *apparently* within the terms of the power, the principal is bound by the representation of the agent as to the existence of any *extrinsic* facts essential to the proper exercise of the power where such facts, from their nature, rest *peculiarly* within the knowledge of the agent. The defect consists in the existence of the power itself, and if it did not, the facts requisite to the validity of the bonds being created by statute, were not peculiarly within the knowledge of the town.

¹ We are indebted to the courtesy of Mr. Ch. Judge Selden, for the following opinion, for which he will accept our thanks.—*Eds. A. L. Reg.*

- i The fact that the bonds were negotiable, and purchased for value without notice of the defect, does not, under such circumstances, aid the plaintiff.

The opinion of the court was delivered by

SELDEN, Ch. J.—The bonds or obligations upon which this action was brought, purported to have been issued by the Supervisor and Railroad Commissioners of the town of Sterling, pursuant to sec. 1 of the act of June 22, 1851, authorizing these officers, under certain circumstances, to execute such bonds. Several objections were made, upon the trial, to their validity. The statute authorized the Supervisor and Commissioners “to borrow” a sum not exceeding twenty-five thousand dollars, upon the credit of the town, and “to execute therefor, under their official signatures, a bond or bonds,” &c. The money, when obtained, was directed to be *paid over* to the president and directors of a railroad company then about to be organized for the construction of a railroad through the said town, “to be expended by them in grading and constructing” such road.

Instead of *borrowing* the money, the Supervisor and Commissioners executed and delivered the bonds in question directly to the railroad company in payment for stock for which they were authorized by the act to subscribe, and they were subsequently sold by the company at a discount. The question is, whether this was within the authority conferred by the act? It is clearly not within its language. No money was borrowed, and nothing else was authorized by the *terms* of this act. If, however, what was done was the same *in effect*, as if the money had been borrowed and paid over to the railroad company, the difference in form would not be material. But it is plain that, neither in respect to the railroad company or the town, was its effect the same. If the statute had been pursued, the company would have had a sum equal to the par value of the bonds to expend upon their work. As it was, they were compelled to sell the bonds at a discount, in order to realize the money.

If the railroad company could sell at a discount at all, it could of course sell at any sacrifice, however great. The bonds of the town of Sterling for twenty-five thousand dollars might have been

sold for ten thousand. Can it be supposed that if such a power had been specifically asked of the legislature, the request would have been granted? Would the town have been permitted to incur a debt, to be paid by taxation upon its inhabitants, of twenty-five thousand dollars, for the sake of furnishing the railroad company with ten thousand to be expended upon its works? I think not; and yet this is, *in effect*, the power which it is claimed was conferred by the act authorizing the town to borrow. The rate of discount, whether more or less, can make no difference with the principle.

Had the town itself made the sale, and paid over the avails to the railroad company, it seems to me entirely clear that the transaction would have been illegal. It is usual for the legislature, when conferring upon a municipal or other corporate body the power to raise money upon the faith and credit of the corporation, to guard against such a sacrifice. An example of this may be seen by referring to the act amending the charter of the city of Rochester, passed July 3, 1851. By sec. 12 of that act, the Common Council were authorized to create a public stock not exceeding thirty thousand dollars, to be applied to the erection of a City Hall, and for that purpose to issue bonds or certificates in the usual form. They were also authorized to sell and dispose of such bonds or certificates "upon such terms" as they should deem most advantageous to the city, "but not for less than par." By sec. 285 of the amendatory act, power was also conferred upon the Common Council to borrow, upon the faith and credit of the city, a sum not exceeding three hundred thousand dollars, at a rate of interest not exceeding seven per cent., and to issue bonds therefor; and, by sec. 286, they were authorized to sell and dispose of such bonds upon such terms as they might deem most advantageous, and to invest the proceeds in the Genesee Valley Railroad Company; but they were expressly prohibited from selling them for less than par.

The reason why such a prohibition was not inserted in the act under consideration, can be readily seen. By each of the sections of the act amending the charter of the city of Rochester, to which I have referred, the Common Council were expressly authorized to *sell* the bonds, and hence the necessity for the restriction. In the

present case the only authority given by the act is *to borrow* upon the bonds of the town. No express power to sell the bonds is given, and no such power can be implied. To borrow money, and give a bond or obligation for it, and to sell a bond or obligation for money, are by no means identical transactions. In the one case, the money and the bond would, of course, be equal in amount. In the other, they might or might not be equal. Hence, a mere authority to a corporation *to borrow* money upon its bonds, is equivalent *ex vi termini* to an authority to dispose of its bonds *at par*, and no further restriction is necessary.

But it is true, the town did not itself sell the bonds, or make any sacrifice upon them. It transferred them to the railroad company *at par* in payment of stock for which it was authorized to subscribe. This, however, in my view, does not strengthen the plaintiff's case. It was as much a departure from *the terms* of the statute, as if the town had itself sold the bonds at a discount, and was equally inconsistent with its object and intent, which was, that the railroad company should receive a sum equal to the amount of the debt incurred by the town to expend upon the road, in the completion of which the town was supposed to have an interest. It is a well-settled and salutary rule in respect to every statutory authority of this kind, that the statute must be strictly pursued. In this case there is not only a literal but a substantial difference between the course pursued and that pointed out by the statute. It follows that the bonds were illegally issued, and were consequently void in the hands of the railroad company; and as the referee has expressly found that the plaintiff became the purchaser with full knowledge that the bonds had not been issued for money borrowed, but in payment for the stock of the company, he is in no better situation than the railroad company itself.

There is another objection which is equally fatal to the validity of the bonds. Sec. 1, of the Act of 1851, after conferring upon the Supervisor and Railroad Commissioners power to issue the bonds, concludes with a proviso to the effect, that these officers should have no power to do any of the acts authorized by the statute until "the written assent of two-thirds of the resident per-

sons taxed" in the town, as appearing upon the last assessment roll, should have been obtained and filed in the Clerk's office of Cayuga County. Each of the bonds upon which the action was brought, stated upon its face that the requisite assent had been obtained and filed, and to each was attached a certificate in the following words: "Cayuga County, Clerk's Office, ss: I, Edwin B. Morgan, Clerk of the County of Cayuga, hereby certify, that a paper purporting to be the written assent of two-thirds of the resident tax-payers of the town of Sterling, with the affidavit required by sec. 1 of the Act referred to by its title in the foregoing bond, has been filed in this office."

The statute did not authorize the giving of any such certificate, nor did it provide for the filing of any affidavit, or prescribe in any manner the evidence by which the written assent should be established. The paper referred to in the certificate was also produced from the files of the Clerk's office, with a number of names attached. This paper, together with the certificate, was read in evidence under objection by the defendant's counsel. No evidence was given or offered of the genuineness of the signatures; nor that the subscribers were non-resident tax-payers of the town of Sterling; nor that the persons whose names were appended, if tax-payers, would constitute two-thirds of the whole number. The defendant's counsel moved for a non-suit for want of such evidence, and the motion was denied.

It was not contended upon the argument, if the obtaining of the written assent of two-thirds of the tax-payers pursuant to the statute is to be regarded as an indispensable pre-requisite to the exercise of the power to issue the bonds, that the evidence was sufficient under the ordinary rules of evidence to establish the fact. But it was claimed on the part of the plaintiff,

1. That the provision in regard to the consent of the tax-payers was not intended as a condition precedent, but merely as directory to the Supervisor and Commissioners; and that whenever those officers were satisfied that such consent had been given, they had power to act.

- 2 That the town was estopped by the acts of its agents, in

executing bonds, asserting upon their face that the requisite assent had been obtained and filed, and negotiating these bonds with the certificate of the County Clerk annexed; especially after having acquiesced for a considerable time in such acts.

3. That the bonds are negotiable instruments, and that the plaintiff is a *bona fide* holder without notice of the defect.

The first of these positions is obviously untenable. It is quite impossible to construe the proviso in the statute as embracing a mere direction to the officers upon whom the authority is conferred. It was plainly intended to make the obtaining of the assent of the tax-payers a condition precedent to the exercise of the power. Its words are: "Provided always that the said Supervisor and Commissioners *shall have no power* to do any of the acts authorized by the act until, &c." This admits of but one interpretation. It would be impossible to create a condition by language more explicit. The want of proof, therefore, that this condition had been complied with must be fatal to the recovery, unless the plaintiff is protected as a *bona fide* purchaser, or can maintain his position that the town is estopped.

The estoppel contended for is supposed to result from that rule of the law of principal and agent pursuant to which it is held, that when a power is conferred, if the agent does an act, which is *apparently* within the terms of the power, the principal is bound by the representation of the agent, as to the existence of any *extrinsic* facts, essential to the proper exercise of the power, where such facts from their nature rest *peculiarly* within the knowledge of the agent. This is the doctrine asserted in the case of *Farmers' and Mechanics' Bank vs. Butchers' and Drovers' Bank*, 16 N. L. R. 137. No representation of the agent as to *the fact of his agency*, or as to the *extent of his power*, is of any force to charge the principal. But it being shown by other evidence that the agency existed, and that the act done is within the general scope of the power, the principal is bound by the representation of the agent as to any essential facts known to the agent, but which the party dealing with him had no certain means of ascertaining.

The reason upon which that rule is founded is that given by

Lord Holt, in *Hern vs. Nichols*, 1 Salk. 289, viz.: that where one of two innocent parties must suffer through the misconduct of another, it is reasonable that he who has employed the delinquent party, and thus held him out to the world as worthy of confidence, should be the loser. This reason can, of course, only apply to a case where the principal has *himself* employed the agent, and voluntarily conferred upon him power to do the act. This clearly is not such a case. The agents here were designated not by the town, but by the legislature; and no power whatever was conferred by the town, unless the assent of the tax-payers was obtained. Any representation therefore by the Supervisor and Commissioners in respect to such assent, would be a representation as to the very existence of their power. Such representations as we have seen are never binding upon the principal. It is obvious, therefore, that the doctrine of the case of the *Farmers' and Mechanics' Bank vs. The Butchers' and Drovers' Bank*, has no application to the present case. It is also inapplicable for another reason. Knowledge of the facts in regard to the assent of the tax-payers was in no manner peculiar to the Supervisor and Commissioners, but was equally accessible to the parties receiving the bonds. The statute, of which they were bound to take notice, apprised them, that the bonds could not be legally issued until the requisite assent was obtained, and also that the assent when obtained would be placed upon the files of the County, to which all persons had access. The case is not therefore at all like that of the *Butchers' and Drovers' Bank*, where the extrinsic fact related to the state of the accounts of the bank with one of its customers, which could only be known to the teller and other officers of the bank. Here the parties who received the bonds, had the means of ascertaining, and were bound to inquire as to the existence of the facts, upon which, as they knew, the validity of the bonds depended. (*Note 1.*)

The negotiability of the bonds in no manner aids the plaintiff. It is true they are negotiable, and have in this respect most if not all the attributes of commercial paper, (*Note 2.*) But one who takes a negotiable promissory note or bill of exchange, purporting to be

made by an agent, is bound to inquire as to the power of the agent. Where the agent is appointed and the power conferred, but the right to exercise the power has been made to depend upon the existence of facts, of which the agent may naturally be supposed to be in an especial manner cognisant, the *bona fide* holder is protected; because he is presumed to have taken the paper upon the faith of the representation of the agent as to those facts. The mere act of executing the note or bill amounts of itself in such a case to a representation by the agent, to every person who may take the paper that the requisite facts exist. But the holder has no such protection in regard to the existence and nature of the power itself. In that respect, the subsequent *bona fide* holder is in no better situation than the payee, except in so far as the latter would appear of necessity to have had cognisance of facts, which the other cannot be presumed to have known.

There is an obvious distinction between this case and that of the *State of Illinois vs. Delafield*, 8 Paige, 527. There the *State* was the party to be bound, and the State had by law appointed certain officers its agents, and conferred upon them power to execute and negotiate its bonds. The difficulty consisted in the irregular and unauthorized manner in which the power was executed, not in the creation of the power itself. The distinction is as plain as that between conditions precedent and subsequent in general.

It follows from these principles, that until it was shown that the written assent of the required number of tax-payers had been obtained pursuant to the act, there could be no recovery upon the bonds. The judgment of the Supreme Court must be reversed, and there must be a new trial with costs to abide the event.

Note 1. The very important question raised in this case as to the power of an agent to bind his principal by his representations, is not yet so definitely adjudicated that any conclusions can be considered as commanding general assent. A review of the positions established by the principal decisions upon the subject may not be unprofitable.

1. It seems entirely clear that no representations by an agent can ever establish the fact of agency. This proposition is true without qualification, both at law and in equity. If a person, who is not in fact authorized, represents that he has power to execute a promissory note for another, the instrument, so far as the supposed principal is con-

cerned, is utterly void. The negotiability of the note will have no effect upon the question, as the inquiry turns upon the existence of the note itself. The term "negotiability," pre supposes the existence of an instrument made by a person having *capacity* or *power* to contract in that particular manner. Instruments made by infants, married women, insane persons, or others without capacity to make binding contracts, gain no additional validity because they may assume the form of negotiable paper. It is entirely immaterial whether the incapacity or want of power is general, or extends only to the particular act in controversy. For similar reasons, an agent can no more enlarge his powers by means of unauthorized representations than he can create them. *New York Life Insurance and Trust Co. vs. Beebe*, 3 Selden, 364.

II. The inquiry then must be confined to the question, what has the *principal said or done* which bears upon the supposed agency? If the power cannot be derived from his representations or acts, it cannot exist at all. In analyzing the acts of the principal, there appear to be only two grounds on which he can be held liable for the representations of his agent: 1. That of identity; 2. That of estoppel.

1. When it is sought to charge the principal on the ground of his identity with the agent, it must appear that he has distinctly authorized the very act in question. If the authority is written, it is purely a question of construction; if oral, and every element of estoppel is absent, it is still necessary to investigate the precise authority conferred. Every act transcending the exact limits of the power granted, is inoperative and void.

2. The difficulty of the case arises when it is sought to apply the doctrine

of estoppel to the law of agency. The inquiry then is, when shall the principal be held liable, though he has not authorized, or perhaps when he has expressly forbidden the act in question? It is apparent that the ground of identity here wholly fails. The agent is not the instrument of the principal. Notwithstanding this, the principal may be liable.

The true ground on this subject must be, that the principal may be liable for the acts of the agent when he exercises an employment which, by well-established usage, confers upon him certain powers, or when the authority, in form or in terms, includes the act in question. In these cases, the principal may be bound to third persons, though the agent did an unauthorized act, provided they had a right to act, and did in fact act, upon the understanding that the agent was authorized to proceed in the particular case. In the first class of cases, the authority given by usage *must be measured by the usage*. It cannot exceed this by a hair's breadth. The only inquiry is as to its exact limits and extent. This point is well illustrated by the familiar rule, that, by the usage of trade, a factor has a power to sell on credit. This he may do (contrary to express instructions from the principal) to an honest purchaser. But, as usage gives him no power to pledge goods, he cannot, in the absence of a statute, confer upon an honest pledgee a right to retain them for advances actually made. It is conceived that, upon this ground, the noted case of *Grant vs. Norway*, 10 C. B. 664, is best sustained. In this case, the master of a ship having the power conferred by usage to sign bills of lading for goods placed on board of his ship for transportation, executed fictitious bills of lading. It was held, that though these passed into the hands of *bona fide* assignees, they could not sue the owner for the deceit. The

action was on the case for deceit. The power to sign bills of lading was *not given* "directly by the owner, but by commercial usage." The authority of the master could not be extended beyond such usage. The opinion of the Court evidently rests solely upon this ground. Says the Court: "The authority of the master of a ship is very large, and extends to all acts that are usual and necessary for the use and enjoyment of the ship. So with regard to goods put on board, he may sign a bill of lading, and acknowledge the nature, quality, and condition of the goods. Constant usage *shows* that masters have that general authority; and if a more limited one is given, a party not informed of it is not affected by such limitation."

"Is it then usual, in the management of a ship carrying goods for freight, for the master to give a bill of lading for goods not put on board? For all parties concerned have a right to assume that an agent has authority to do all which is usual." After showing that it was not usual to sign such bills, the Court proceeds: "If then, from the usage of trade and the general practice of shipmasters, it is generally known that the master derives no such authority from his position of master, the case may be considered as if the party taking the bill of lading had notice of an express limitation of his authority." Pp. 686-7-8. This case is then authority simply for the proposition that, when an effort is made to bind the principal by the usages of trade, the authority is *to be limited* by the usage as well as created by it. In this point of view, it is impossible to doubt the soundness of the decision. It has often been cited, however, as establishing another and quite a different doctrine. But the statement of the case shows that the turning point must have been the proper construction to be given to a well settled usage. Precisely the

same view must be taken of the case of *Freeman vs. Buckingham*, 18 How. U. S. 182. The charterer of a ship, by a fraud, induced the master to sign fictitious bills of lading, and the question here was as to the usage. The Court make the decision rest upon a similar ground, citing with approbation the case of *Grant vs. Norway*, although the reasons upon which that decision rests were not presented with entire fulness. See also *Walter vs. Brewer*, 11 Mass. 99.

If we now examine the second class of cases we shall find no such accurate limitation of authority, as where the extent of a usage is in question. It is evident that the principal may, if he sees fit, bestow an unlimited authority. The inquiry then must be, what is the legitimate inference to be drawn from the statements or acts of the principal, as viewed by one who gives credit to them in good faith? The inference may be derived from a series of recognitions of the agent's act or from direct employment. It is believed that the following principles are applicable. 1. The authority or employment must, *in form* or apparently, include the act in question. If this were not so, we should be led to the conclusion that an agent might establish an agency by his own representations. 2. The acts or representations of the agent must naturally lead to the conclusion, that the supposed authority does exist. In other words, he must, in substance, affirm that the act in question forms *no exception* to the general delegation of authority. Such an affirmation is not to be regarded as creating an agency, but simply as an assertion that what has previously *appeared to be true* by the representations of the principal, is actually true. 3. The representations must have been made directly to third persons, so as to have induced their action and to have created a *privity of contract* between

the principal and such person. 4. The fact that the particular act was not within the general delegation of power, must have been peculiarly within the knowledge of the principal. Very little discussion of this subject can be found in the earlier cases. It has been pressed upon the attention of modern jurists on account of the fact, that a large class of commercial business is performed through the medium of agents, especially that which is transacted by corporations. We are inclined to think that the doctrine itself is a modern one. The case which is usually cited, is *Herne vs. Nichols*, 1 Salkeld, 289. It was decided by Lord Ch. J. Holt at Nisi Prius: "In an action on the case for a deceit, the plaintiff set forth that he bought several parcels of silk for — silk; whereas it was another kind of silk, and that the defendant well knowing this deceit, sold it to him for — silk. On trial, upon not guilty, it appeared that there was no actual deceit in the defendant, who was the merchant, but that it was in his factor beyond sea; and the doubt was, if this deceit could charge the merchant; and Holt, Ch. J., was of opinion that the merchant was answerable for the deceit of his factor, though not *criminaliter*, yet *civiliter*; for seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger, and upon this opinion the plaintiff had a verdict." From this meagre report of the case, its doctrine would seem quite doubtful as applicable to *agents in general*, because it has been distinctly held, after thorough discussion, that a mere power to sell does not of itself include a power to warrant: *Brady vs. Todd*, 9 C. B., N. S. 596-7, (1861;) and *a fortiori* does not include a power to misrepresent the qualities of the article. If the decision were made to

depend upon peculiar rules applicable to factors, it would become, as before stated, a question of usage. The true ground of the decision is, doubtless, indicated by Cresswell, J., in *Coleman vs. Riches*, 16 C. B. 117. He says: "*Herne vs. Nichols* was a case of misrepresentation, not fraud; *the defendant there adopted the act of the factor.*" When placed upon this ground, the decision can be readily understood. The subsequent recognition of the act was upon general principles, equivalent to a prior command. Otherwise, it would be plainly repugnant to the case of *Southern vs. How*, 2 Croke, 469-70-71. In that case, three counterfeit jewels were fraudulently sold by the factor of the defendant to the plaintiff in Barbary, for good jewels. Their value was £100, and were sold for £800. The plaintiff, regarding them as valuable, sold them to the King of Barbary, who, discovering their true character, imprisoned the plaintiff until he repaid the £800. It appeared that the defendant was not cognisant of the fraud of the factor. The Court inclined against the plaintiff, upon the ground that, as the master did not command the servant to conceal the character of the jewels, he shall not be charged if the servant exceeds his power. The doctrine of *Herne vs. Nichols*, if so qualified, is supported by the recent case of *Udell vs. Atherton*, 4 Law Times, N. S. 797. In that case, the principal authorized the agent to sell a log of mahogany. He fraudulently concealed a defect in the article, making at the same time a wilful misrepresentation in respect to it. The principal was innocent; but, as he *retained the benefit of the contract*, he was held liable in an action for deceit. The form of action was the same as in *Herne vs. Nichols*. The opinion of Wilde, B., is especially noticeable. Mr. Addison, in his recent work on torts, makes the same distinction

tion. He says: "If a fraudulent act has been committed by the agent, and his act is adopted, and the principal takes the benefit of the contract, he is liable in an action for deceit;" (citing 1 Scott, N. R. 685;) "but if the principal repudiates the transaction, and the representation is not within the scope of an agent's ordinary authority, he is not liable." 10 C. B. 688. It is not intended to deny that the reason given by Lord Holt is a good one in a proper case, but only to question its applicability to the facts as they appear in *Salkeld*.

This class of authorities is evidently but of little weight in respect to the question of the responsibility of the principal where the act of the agent *imposes a burden upon him*, and he seeks, as soon as it is ascertained, to repudiate it, and where there is no settled usage to determine the agent's authority. As far as can be ascertained, this question has not been distinctly presented in any of the English cases. It came up recently (1857) in the State of New York in the case of *The Farmers' and Mechanics' Bank vs. The Butchers' and Drovers' Bank*, 16 N. Y. (2 Smith,) 125; S. C. 14 N. Y. (4 Kern,) 628. The teller of the latter bank was in the habit of certifying the checks of customers with the knowledge of the officers of the bank, and was provided with a book for the express purpose of keeping a memorandum of such checks. He was under express instructions not to certify when the drawer of the check had no funds. In direct violation of his instructions, he certified checks for a person who had no funds to his credit, and they came into the hands of an honest holder for value. Upon this state of facts the bank was held liable. The question was admitted for the purposes of the case to be, whether a *bona fide* holder for value of a negotiable

check, certified by a special agent, whose authority is limited to cases where the bank has funds of the drawer in hand, can enforce payment of the check, provided the bank has no such funds.

It will be observed, that the statement of the question excludes cases of the first class where *usage* is an element. No usage was pretended, and no argument drawn from cases of that sort can be relied upon. The Court laid very considerable stress upon that well-known rule of the law of partnership, that one of the parties may, notwithstanding express restrictions, bind the firm upon a contract made within the scope of his employment. It would, however, seem that the power of the individual partner belonged to the first class of cases. It is conferred, not by *special authority*, but by *law*. This view is taken by the Court of Common Pleas in England in a very recent case, (1861)—*Brady vs. Todd*, 9 C. B., N. S., 596-7—*Erle, C. J.*, delivering the opinion. "Partners have an authority conferred upon them by law in the same manner as masters of ships." p. 604. The Court expressly distinguishes this class of cases from those where the principal holds out that the agent has an authority, and induces another to deal with the agent on the faith of the representation.

Dismissing, then, the case of partners, masters of ships, &c., from view, from what source can the authority of the teller be derived? We think that the question of *negotiability* is not involved. It must ever be borne in mind, that the want of a *power to make an instrument*, being a question of capacity, is a defect which defeats it *at law*, and makes it utterly void. An instrument must at least *exist* before it can be negotiable. For this reason the important case of the State of Illinois *vs. Delafield*, 8 Paige, 527, S. C. in Error, 2 Hill, 159, is not

parallel In that case an agent was restricted from selling certain negotiable bonds of the State of Illinois below par, or on credit. In violation of his instructions, he passed them to Delafield, who was cognisant of his breach of duty. Delafield was prevented by injunction from negotiating them, on the ground, that if they passed into the hands of an honest holder, the State must pay them. But in this case the bonds were *valid instruments, having been duly executed according to statute*. Even a wrong-doer might have transferred them to an honest purchaser without reference to the question of agency. But the question in the case of the Butchers' & Drovers' Bank was, whether the instruments were properly executed, or even existed at all.

Assuming, then, that the power of an agent to *create* an instrument must be measured in all cases by the same general principle, it would appear that the ordinary rules of the law of estoppel *in pais* must be invoked whenever it is sought to make a principal liable for the unauthorized acts of an agent, which he seeks to repudiate. The rule appears to be accurately stated in *North River Bank vs. Aymar*, 8 Hill, 270: "Whenever the very act of the agent is authorized by the terms of the power, that is, whenever, by comparing the act done by the agent, with the words of the power, the act is in itself warranted by the terms used, such act is binding on the constituent as to all persons dealing in good faith with the agent. Such persons are not bound to inquire into facts *aliunde*. The apparent authority is the real authority." Though the rule is enunciated as to *written* powers, its principle extends to other cases. Upon this theory the case of the Butchers' & Drovers' Bank was correctly decided. The Bank had authorized the teller to sign instruments *in form*, including the one in question, and

the purchaser acquired the check upon the faith and representation of the agent that it was included within the class of cases to which his authority extended. This principle would include all cases where the measure of authority was derived from the act of the principal, and another acted upon the representation. Thus, if there were *no rule of law or usage* limiting the authority of masters of ships to sign bills of lading, any person expressly authorized to execute them might bind his principal even if goods were not put on board, if a consignee acted upon the faith of the certificate that the goods had been shipped for his use by the consignor. See *Walter vs. Brewer*, 11 Mass. 104. In other words, the difference between *Grant vs. Norway* and the case of the Butchers' & Drovers' Bank, is simply this: in the one the authority is established by law, and as such cannot exceed the legal limit; in the other, the authority is directly conferred by act of the principal, and may extend so far as he pleases, or he may so clothe his agent with an apparent authority as to make him liable upon the rules applicable to estoppels *in pais*. Consequently, as new cases arise not affected by a well defined usage, the liability of the principal must be ascertained solely from the proper inferences to be drawn from his acts. If tellers of banks, for a long period, by a well settled usage, had authority merely as tellers to certify checks for customers only who had funds, we apprehend that the negotiability of the check would not protect even a bona fide purchaser when there were no funds. In fact, the very limitation by the usage gives the purchaser notice of a want of authority, and puts him upon inquiry, and upon that fact of implied notice the case of *Grant vs. Norway* turned. It remains to explain one or two cases which may appear to conflict with these views. The first

vs. Coleman vs. Riches, 16 C. B. 103. It appeared in that case that the plaintiff was a corn dealer, who bought corn which was delivered at the defendant's wharf by the vendors. The defendant, or his agent, was in the habit of giving receipts to the vendors, and it was the practice for the plaintiffs to pay such vendors for the corn stated in the receipts to have been delivered. The plaintiff's agent wilfully gave a receipt in a particular case to a person who had not delivered any corn to the plaintiff's use, and the plaintiff, in accordance with his usual practice, paid such supposed vendor. He then sued the defendant for the loss occasioned by the fraud of the agent. There was no evidence that there was any agreement between defendant and plaintiff, to give these receipts, but they appeared to have been mere memoranda between the defendant and the sellers. They were voluntary, and not designed to influence the plaintiff's conduct. On this ground the defendant was held not to be liable. Says Jervis, C. J.: "I do not see how Riches' (def't) *knowledge* that Coleman (pl'ff) was in the habit of paying the vendors on the production of his receipt acknowledging the delivery of the wheat, makes his giving such a receipt a representation to Coleman." p. 106. So Cresswell, J.: "I have looked carefully through the evidence, and have failed to discover anything from which we can infer any such course of dealing as would render the defendant liable to the plaintiff for the fraudulent representation of his agent. To do so we must assume that there was some contract between the parties, that a receipt should be given only upon the delivery of the wheat, in order that the plaintiff might be protected from paying for it before it was sent. There clearly was no evidence to warrant that. It may be true that Coleman was in the habit of paying for

the corn he purchased, upon the production of a receipt, and that Riches knew it. *But the defendant had nothing to do with the plaintiff's manner of conducting his business.* It leaves the case just as it was before." p. 119. The other Judges express similar views.

This case simply holds that an estoppel cannot arise unless the representation of the principal was made to the third party, so that he had a right to act upon it. It is quite apparent from the case, that if there had been an understanding between the parties that the receipts were to be given, the defendant would be liable for the fraud of his agent. Thus that able Judge, Williams, J., says in the same case: "If there had been evidence of an agreement between the plaintiff and defendant, that the latter should furnish the vendor with receipts on the delivery of the corn, upon the faith of which receipts the former should pay the price, I must confess I should have felt great difficulty in saying that the defendant would not be liable for the fraud of an agent, by means of which the plaintiff had been induced to part with his money on the faith of such delivery having taken place." The same idea pervades the opinion of the other Judges. Another case, which it may be well to distinguish, is that of the *Mechanics' Bank vs. New Haven Railroad Co.*, 8 Kernan, 599. A corporation had appointed a transfer agent, who was authorized, in the ordinary manner, to transfer existing shares of stock upon the books of the company, and to give the usual certificates to the transferee. In company with a confederate, he issued spurious certificates, purporting that his confederate was entitled to certain shares of stock. These were indorsed in blank, and pledged to the plaintiff, who made advances upon them in good faith. They were not transferred to him upon the

books of the corporation. The Court held that he acquired no right to any stock, and that the railroad corporation was not liable in damages for the fraudulent act of the agent.

The ground of this decision is, that the principal is not directly liable for the unauthorized act of the agent, and that the law of estoppel was not applicable, because no representation was made to the plaintiff. The transfer of the stock certificate furnished no evidence of a contract between the plaintiff and the defendant. In fact, the stock was not assignable at law, being a mere chose in action, but, by the peculiar rules of equity jurisprudence, the assignor was converted into a trustee for the assignee. It is one of the most elementary principles of equity law, that the assignee in such a case obtains no more right than the assignor, unless he can show a direct and distinct representation made to himself, by the person liable, upon the faith of which he made the purchase. As no such representation was shown, and as his assignor had no rights against the railroad company, he had none. The case is not inconsistent with the principles hitherto established. In this connection negotiability becomes important. It cannot aid an instrument which does not come either within the actual or apparent power of the agent. But when a negotiable instrument is *in form*, though not in fact, authorized, and the person who takes it, is privy to the agent's fraud, though he has himself no rights against the principal, he can make him liable by transferring it to an honest holder. The negotiation connects the representation of the principal with the holder, and makes him privy to a contract.

To sum up the conclusions attained; it has been shown that an agent cannot create an authority by his own representations, but that in all cases the conduct

of the principal is the subject of inquiry. The principal can become liable on two grounds: that of identity and of estoppel. Upon the ground of estoppel he may be liable either where there is a fixed usage respecting the agent's authority, or where an apparent power is conferred by direct authority. In the case of usage, the authority is limited by the usage itself. In an authority expressly or actually conferred, the inquiry must be whether the principal in form held out the agent, as having power to do the act in question, to the party who acted upon it, and whether the third person did accordingly act in good faith. If so, the principal is liable. But where the agent did the act without being held out as authorized, the principal is not liable, even though he knew the conduct of the agent. He is also not liable where the agent fraudulently creates an unauthorized chose in action in confederacy with another, and such other transfers the chose in action to an innocent assignee. This last proposition rests upon the peculiar rules of equity jurisprudence as applied to the assignment of choses in action.

Note 2. It may now be regarded as settled law, that bonds of a certain class are to be deemed negotiable. This is not true, of course, of ordinary bonds which are only assignable in equity. The doctrine of negotiability has been extended to exchequer bills, (4 Barn. & Ald. 1,) government bonds, (*Gorgier vs. Mieville*, 3 Barn. & C. 45; *Long vs. Smith*, 7 Bing. 284; *Delafield vs. State of Illinois*, 8 Paige, 527, s. 62, Hill, 159,) and other municipal bonds, such as those of towns and counties. *Bank of Rome vs. Village of Rome*, 19 N. Y., 5 Smith, 20; *Gould vs. The Town of Sterling*, *supra*; *contra*, *Deaman vs. Lawrence County*, 37 Penn., (1 Wright,) 358, (1860.) The Court in this case admits that its view is contrary to the current of American decisions

The grounds upon which the Court insists, in order to establish its peculiar views, are, that such bonds are creatures of statute, lawful only by a special and extraordinary exercise of legislative omnipotence: that they usually recite the authority by which they exist; that they are called by the legislature "certificates of loans" or bonds, and that they are under seal. The only one of these reasons which appears very strong, is the last, and it is now perhaps too late to lay much stress upon it. Railroad bonds are likewise decided to be negotiable in *Morris Canal & Banking Co. vs. Fisher*, 8 Am. Law Register, 428, (N. Jersey); *White vs. Vermont & Mass. R. R. Co.*, 21 How. (U. S.) 576, and cases cited. It was held in this case, that when payable in blank, any bona fide holder could

fill them up, payable to himself or order. A contrary conclusion was arrived at in England. *Hibblewhite vs. McMorine*, 6 M. & W. 200, *Enthoven vs. Hoyle*, 13 C. B. (Ex. Cham.) 373. It was also decided in the last case, that the coupons, when detached from the bond, could not be deemed anything more than "tokens," unless they contained within themselves the elements of a promissory note. "The detached coupon (in that case) was nothing but a mere piece of paper, it is no bill of exchange, no promissory note, because it wants the essential character of a promissory note, seeing that there is not the name of any person mentioned in it as payee." They may undoubtedly be drawn so as to constitute, when detached, promissory notes.

T. W. D.

RECENT ENGLISH DECISIONS.

In the Court of Queen's Bench, 1862.

GALLIARD, APPELLANT, vs. LAXTON, RESPONDENT.¹

1. A warrant was issued by a justice of the county of C., directed to the constable of the township of N., and generally to all her Majesty's officers of the peace in and for the said county, commanding them, or some of them, forthwith to apprehend W. G., and convey him before two justices of C., to answer for not obeying a bastardy order for payment of money. The warrant was delivered to the superintendent of police, and had subsequently been in the possession of D., one of the police constables. Afterwards D. and S., police constables, while on duty in uniform, arrested W. G. under the warrant, but they had it not in their possession at the time of the arrest, it being at the station-house. W. G. was rescued by several persons, who assaulted the constables D. and S. Whereupon informations for the rescue and assault were laid against the parties by the constables; and at the hearing before justices the complaint as to the rescue was withdrawn, and that for the assault proceeded with, and the parties were convicted: *Held*, that the conviction was bad, as the arrest by the constables was illegal, they not having the warrant in their possession at the time:
2. *Held* also, that the withdrawal of the information as to the rescue was no bar to proceeding with the complaint as to the assault.

¹ 5 Law Times, Rep. N. S., 885.

Case stated for the opinion of this Court upon a summary conviction by Justices.

Feb. 14.—*Gibbons*, for appellant, cited Lambard's *Irenarcha*, 97, edit. 1602; Dalton on the Office of Sheriff, 110; *Robins vs. Hender*, 3 Dowl. 543; *Fownes vs. Stokes*, 4 Dowl. 125; *Reg. vs. Whalley*, 7 C. & P. 245; *Countess of Rutland's Case*, 6 Co. Rep 52.

No one appeared in support of the conviction.

Cur adv. vult.

Feb. 22.—WIGHTMAN, J.—This case was argued before my brother Crompton and myself at the sittings after last term. The first question proposed to us is of much general importance, inasmuch as it may arise in cases where an illegal arrest may be carried to the extent of wounding, or killing an officer. It appears that a warrant had been issued by a magistrate of the county of Chester, directed to the constable of the township of Nantwich, and all her Majesty's officers of the peace in and for the said county, commanding them, or some or one of them, forthwith to apprehend William Galliard, and convey him before two justices of the county of Chester, to answer for the not obeying a bastardy order for payment of money. This warrant is stated to have been given to the Superintendent of Police, and by him to have been given to the police at Monks Coppenhall, in the county of Chester, of which place William Galliard is stated in the warrant to be; and it had subsequently been in the possession of Dyson, one of the police constables who arrested William Galliard, but he had it not with him at the time when he made the arrest, it being then at the station-house at Monks Coppenhall, and in the actual possession of the Superintendent of Police there. Upon the 1st July last Dyson, who was the public constable, arrested William Galliard under the warrant, but did not produce it, nor was he asked to produce it, and the question is, whether to make the arrest legal, there must at the time have been a warrant which was ready to be produced if necessary, though the warrant is not addressed to any officer by name, but to the constable of Nant-

wich and all the officers of the peace in and for the county generally? This general form of direction seems to be warranted by the 5 Geo. 4, c. 18, s. 6, and Dyson and the other policemen under him come within the description of the persons to whom the warrant is addressed. It is not stated what words were used by the officers at the time they made the arrest, but as they do not seem to have been impressed with any conviction that they were to inform William Galliard of the nature of the charge, it may be presumed they did tell him they only arrested him under the warrant, and not what the charge was. As they were obviously police constables, we think they were not bound, in the first instance, to produce the warrant at the time they made the arrest; but as this was not a charge of felony, but rather in the nature of a civil proceeding, the warrant ought to have been produced if required, and the arrest without such production would not be legal. The production of the warrant was not, however, required before or at the time when the arrest was made, notwithstanding the resistance of the appellee and his brother, nor indeed at any time, and as the warrant was in existence at the station, where, no doubt, it could readily have been procured, it may be said there was no reason for its being in the hands or the pocket of one of the officers, and there was no disadvantage to the person arrested by reason of its being there. That, no doubt, may be so under the circumstances which are referred to in the case; but suppose it had happened that, after the arrest had been effected, in spite of the resistance made, and before the appellee's brother had been taken to the station where the warrant was, the appellee had requested the officer to produce it, which not having it, he could not do, how would the case have stood then? We have already expressed our opinion that, if requested, the officer was bound to produce the warrant, and if he did keep it in his custody after such request, the non-compliance would not be legal, and it could hardly be contended that the arrest itself would be legal, and that the detention under the circumstances adverted to would be legal. On this view of the case it appears to us that the officers were bound to have the warrant ready to be produced, if required; if they had it not,

the arrest would not be legal. If an action had been brought against the officers for making the arrest, and they had pleaded a plea of justification under the warrant, they must, according to the precedents, have pleaded it was delivered to them to be executed; and though it is not stated in the precedents they should have actual possession at the time of the arrest, it is to be presumed, from the allegation of delivery to them, that they continued to hold it. MacKalley's case, 9 Coke, 69 a, is distinguishable on the ground suggested by East in his treatise on Pleas of the Crown, vol. i. p. 318. See also in 1st Hale's Pleas of the Crown, 458. We are unable to find any case in which the precise point raised for our discussion has been decided. We are, therefore, of opinion that the officers making the arrest ought to have had the warrant with them, ready to be produced in case it should be required, and not having it they were not justified in making the arrest. As to the second point, we are clearly of opinion that the withdrawal of the information as to the rescue afforded no valid ground of objection to the proceeding under the information for the assault. Therefore the conviction will be quashed.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF NEW YORK.¹

Warranty on a Sale of Chattels—Rule of Damages for Breach of.—

Where a warranty of a thing has reference to a purpose for which it is to be used, the rule of indemnity on a breach of the warranty must include the damages which naturally followed, and might be expected to follow, its violation, when the thing warranted is put to the intended and understood use: provided such damages are in their nature certain, and it is also certain that they proceeded from the breach of warranty: *Passenger vs. Thorburn*.

The plaintiff, a market-gardener, applied to the defendant for seed of a particular kind of cabbage—the Bristol. The defendant being acquainted with the plaintiff's business, and the purpose for which the seed was

¹ From Hon. O. L. Barbour, Reporter.

wanted, professed to have that seed, and showed him a sample of the cabbage the seed would produce; said he knew the seed was Bristol cabbage seed, and warranted it as such. The seed being purchased and planted, proved not to be of the Bristol cabbage, and produced a crop of but little value. *Held*, that the rule of damages was such loss as the plaintiff had sustained by the crop not being what the warranty in substance said it should be—Bristol cabbage: *Id.*

Latent Ambiguity—Vendor and Purchaser: Tender of Deed—Liquidated Damages.—Where, in a contract for the sale and conveyance of land, there was no other description of the premises except what was contained in the words "his farm," it being clear, from the contract, that these words referred to the vendor's farm, it was *held* to be a case of latent ambiguity which was susceptible of explanation by parol evidence: *Brinkerhoff vs. Olp, Executor, &c.*

Where a purchaser dies before the period when, by the terms of the contract, the first payment is to be made, and possession of the land given, a separate tender of the deed to all the heirs or devisees of the purchaser is not necessary. It is sufficient if a deed, conveying the premises to the heirs and devisees, be tendered to the executor, who represents the testator's means of paying the purchase-money: *Id.*

By an executory contract for the sale and purchase of land, the parties bound themselves, each unto the other, "in the penal sum of \$200, as fixed and settled damages to be paid by the failing party." *Held*, that the sum named was intended as liquidated damages, and not as a penalty: *Id.*

Fixtures; as between Mortgagor and Mortgagee; Action for their Removal; what are such.—In determining whether articles are or are not fixtures, the same rule prevails between mortgagor and mortgagee as between grantor and grantee, and this whether the mortgagee were or were not in possession of the premises: *Laflin vs. Griffiths, Sheriff.*

If articles, before being detached, were fixtures, the person having the title to the realty can, in case of their removal by another, sue for the specific recovery of the things themselves, or in trespass for the damages to the freehold: *Id.*

Though the mortgage debt has become satisfied by the mortgagee's purchasing the premises, at a foreclosure sale, this will not alter his rights in respect to fixtures attached to a building and wrongfully removed there-

from by another. If, at the time of such removal, the mortgagee had the title, even though it were a conditional one, that is sufficient to found an action against the wrongdoer: *Id.*

Where articles of machinery were attached to a building by braces and nails, having been so attached when the building was erected, and having always continued so attached, and the sole use of the building being the accommodation and employment of such machinery, it was held that the articles of machinery were to be deemed fixtures: *Id.*

Vendor and Purchaser—Rescinding of Contract.—Before a purchaser can rescind the contract of purchase, and claim to recover back moneys paid by him on account of the price, he is bound to restore to the vendor the possession of the premises. He cannot occupy under the contract, and thus enjoy the benefit of it, and at the same time treat it as rescinded, and reclaim the purchase-money: *Goelth vs. White.*

The money can only be recovered back when the contract has been rescinded *in toto*, and so long as the purchaser is reaping the fruits of it, it is not wholly rescinded: *Id.*

Married Woman; Her Capacity to make Executory Contracts.—The act of March 20, 1860, concerning the rights and liabilities of husband and wife, by exempting the husband from all liability upon or in respect to bargains or contracts made by the wife in or about the carrying on of her trade or business, recognises the ability of the wife to make executory contracts, which will be valid as against her, notwithstanding her coverture: *Barton vs. Beer.*

Usury.—Any security given in payment or discharge of an usurious security, is equally void with the original. The original taint of usury attaches to all consecutive obligations and securities growing out of the original vicious transaction: *Vickery vs. Dickson.*

A new security of the borrower for the same debt, secured by an usurious mortgage, would be vitiated by the usury; and the obligation of a third person stands upon no better foundation: *Id.*

Opinions of Witnesses.—Although, as a general rule, opinions of witnesses are to be excluded, except upon questions of science and skill to which they have been specially instructed or educated, yet witnesses may give their opinion upon questions of value, and as to the amount of damages a party has sustained, where the damage consists in an injury to or destruction of property: *Nellis vs. McCarn.*

Partnership.—Money originally borrowed by one partner, in his individual capacity, and a third person, upon their joint note, and subsequently by the consent of such third person agreed to be appropriated to the borrowing partner's individual use, cannot be collected of the firm or the other partner, merely from the fact that they have had the benefit of it in their business, or that the account of it is entered on their books; especially where the evidence shows that neither the original loan, nor that from the third person to the borrowing partner, was made upon the credit or for the benefit of the firm: *Tallmadge vs. Panoyer*.

Guaranty.—The defendants purchased of the plaintiff his interest in a stock of goods, and in part payment therefor transferred to him the note of B., indorsing thereon a guaranty of *payment*, but which guaranty, on its face, expressed no consideration. *Held*, that the case was within the decisions which hold that where a guaranty is made for the purpose of paying the party's own debt, it is not a collateral, but an original undertaking, and so good without expressing the consideration: *Fowler vs. Clearwater*.

The taking of such a note, by a vendor, operates as a *giving of credit*, to its maturity, and will prevent the statute of limitations from being a bar: *Id.*

Deed; Parol Evidence of consideration—Parol Promise to pay Debt of Another.—Parol evidence is admissible to show for what consideration, and in what manner a grantee agreed to pay for the land conveyed to her by deed: *Seaman vs. Hersbrouck*.

A parol promise of a party, to whom a conveyance of lands is made, for the purpose to pay, on account of the consideration, certain debts owing by the grantor to third persons, is valid and obligatory upon the promissor without the concurrence or consent of the creditors having been given to the arrangement, and without any suspension or extinguishment of the claims of those creditors, as against the original debtor: *Id.*

If the grantee has already paid the debts of the grantor, so agreed to be paid by her as a part of the purchase-money, that will be a good defence to an action brought against her by other creditors of the grantor, to recover the balance claimed to be due on account of the purchase-money: *Id.*

Parol License to enter upon Land.—A parol license to enter into the possession of land is no defence to an action by the owner of the land to

recover the possession: *Eggleston vs. The New York and Harlem Railroad Company*.

Such a license is not irrevocable, so as to bar the grantor or his heirs from recovering the possession. It will be revoked by a conveyance of the land to another person, or by the death of the grantor: *Id.*

A mere agreement to sell does not, of itself, impart a license to enter into possession: *Id.*

Municipal Corporations; Liability for Acts of their Agents.—Where individuals, claiming to be the agents of a municipal corporation, and to act under resolutions of the Common Council directing the removal of all obstructions in a particular street, go beyond the limits of the street, upon premises in the rightful possession of another, and there commit unlawful acts to the owner's injury, they are personally liable to the owner of the property, but no action will lie against the corporation: *Harvey vs. The City of Rochester*.

The trespasses not being committed by the agents or servants of the corporation in the performance of the acts directed or authorized by the resolutions, the corporation cannot be made liable on the principle of *respondet superior*: *Id.*

A Common Council has no authority, by its agents, servants, or otherwise, to enter summarily upon premises within the corporate bounds of the city, which are owned or lawfully possessed by an individual, and there commit unlawful acts to his injury: *Id.*

If it does so, its acts will be *ultra vires*, for which the corporation is not liable; even if the ordinance under the authority of which the wrongful acts are done specifically direct the doing of these particular acts: *Id.*

SUPREME COURT OF CONNECTICUT.¹

Bill of Exchange—What sufficient Notice of Protest.—The defendant was indorser of a bill of exchange drawn by A. on B., and accepted by B. Notice of the non-payment of the bill by the acceptor was sent to him, which described the bill as "*drawn by you*," and wholly omitted the name of the real drawer, but otherwise described the bill correctly and as indorsed by the defendant. *Held*, that the notice was sufficient to charge

¹ From John Hooker, Esq., State Reporter.

the defendant, in the absence of proof on his part that he had drawn any such bill, or that he had indorsed any other paper of the same general description which could have been mistaken by him for the bill in question : *Gill vs. Palmer*.

Deed, where Merger of previous Contract—Parol Evidence.—The defendant agreed to sell the plaintiffs a patent right for the making of sewing machines, within a certain district, for the sum of \$400, for a part of which the plaintiffs were to give a note and let the defendant have a horse for the balance, the defendant reserving the right to manufacture machines within the district. The note was at once given and the horse delivered, and the defendant thereupon executed and delivered to the plaintiffs a deed conveying the patent right; the deed stating the amount of the consideration and reserving to the defendant the right of manufacturing machines in the district, but containing no stipulations as to the quality of the machines made under the patent. *Held*, that the plaintiffs could not prove by parol evidence that, at the time of the sale and prior to the execution of the deed, the defendant warranted the machines made under the patent "to work well, and not drop stitches, and to do the various sewing of a family :"
Galpin vs. Atwater.

The deed was regarded upon the facts as the contract of the parties, reduced to writing, and therefore as merging all the prior parol transaction, and not as a mere execution, in part, of a prior and complete parol contract : *Id.*

Builder's Lien—Proceedings to Enforce—Waiver by Acceptance of Note—For what given by Statute.—Where the owner of premises which a builder's lien has attached, has conveyed away his interest in the premises, it is not necessary to make him a party to a bill to foreclose the lien : *Rose vs. The Persse and Brooks Paper Works*.

The statute with regard to a builder's lien provides that the builder shall file in the office of the town clerk a certificate of his lien, which shall "describe the premises." A party having a lien on one of three paper mills, which were near each other, and belonged to the same owner, but were independent and susceptible of a separate description, described the premises on which the lien was claimed, as "two tracts of land situated in the town of W., one bounded [&c.], with two paper mills thereon, and the other bounded [&c.], with one paper mill thereon," and described the lien as "for materials furnished and services rendered in the erection and

repairs of said several paper mills." *Held*, that the certificate was void, as not containing a reasonably accurate description of the premises within the meaning of the statute: *Id.*

A party having a builder's lien took notes for the amount of his claim, and gave a receipt as follows—"Received of P. & B. two notes [describing them], in full."—Whether the lien was not discharged thereby: *Quere.* The court inclined to the opinion that, in the absence of proof that the receipt did not exceed the real understanding of the parties, it must be taken to mean that the notes were received in payment, and be regarded as discharging the lien: *Id.*

The statute gives a lien for materials furnished and services rendered in construction, erection or repairs of any building. Where the materials and labor furnished were in the equipping with fixed machinery for the manufacture of paper, a building intended in its erection as a paper mill, but which was in itself a complete and independent structure, it was held that they could not be regarded as furnished for the construction or repair of a building, and that no lien attached to the premises in favor of the party furnishing the same: *Id.*

Assignment of Debt, where in Equity Transfer of Securities—Right of Creditor to Securities held by a Surety—Covenant not to Sue—Pleading in Equity.—Where a mortgage is given to secure a debt, whether the debt be in a negotiable form or not, a transfer of the debt transfers in equity the security, if the security has not previously been surrendered by the creditor: *Jones vs. The Quinpiack Bank.*

But where a mortgage is given, not to secure a debt, but to indemnify a surety, there the security does not in the first instance attach to the debt, as an incident to it, but whatever equity may arise in favor of the creditor with regard to the security, arises afterwards, and comes into existence only upon the insolvency of the parties holden for the debt: *Id.*

Until this equity arises, the surety has a right, in equity as well as law, to release the security: *Id.*

And the equity of the creditor in such a case not being an inherent one, growing out of the contract, but resulting merely from a state of facts which entitles him to equitable relief, and becoming fixed only by the interposition of a court of equity, it seems that the relief cannot be furnished, even though insolvency has intervened, unless the security is

still retained by the surety at the time of the application of the creditor for relief: *Id.*

J. mortgaged certain real estate to B., to secure him for accepting his drafts to the amount of \$50,000. Most of the drafts were at once drawn and accepted. The condition of the mortgage was that J. should *pay at maturity all such acceptances and save B. harmless therefrom*. A few days after, J. desiring to procure a loan from Q., an arrangement was made under which B. mortgaged to Q. all his interest in the mortgaged premises for the security of the loan, and Q., upon the security, advanced \$30,000 to J. Both J. and B. intended to give to Q., and Q. supposed that he was acquiring an interest that was equivalent to a first mortgage of the premises. J. and B. were both at this time solvent and in good credit, but afterwards failed. At the time of their failure the loan to Q. was unpaid, as were also the acceptances of B. under the original mortgage; which latter were then held by parties to whom they had been negotiated. Upon a bill in equity brought by certain holders of these acceptances, against Q., for the application of the mortgaged premises to the payment of the acceptances, it was *held*, 1. That the mortgage was to be regarded as a personal security to B. for his acceptances for J., and not as a security for the bills so accepted. 2. That while J. and B. were solvent, no equity arose with regard to the security in favor of the holders of the bills. 3. That while no such equities existed B. had a perfect right to surrender the security to J., or with his concurrence to make a transfer of it to Q., as security for the loan made by the latter to J. 4. That the right thus acquired by Q., was not affected by the equity in favor of the holders of the bills which arose afterwards upon the failure of J. and B.: *Id.*

C., one of the petitioners, had received certain of the bills from J., as collateral security for a temporary loan, with an agreement that after the loan was paid C. might, at his option, return the bills, or retain them in the place of certain other paper of J. held by C. C. knew, at the time, of the mortgage to B., but had no knowledge of the transaction with Q. The temporary loan was soon after paid, but C. did not exercise his right of option until some weeks after, when he had heard of the conveyance of the security to Q. and of the loan of Q. upon it, and he then elected to retain the bills and give up the other paper, and in doing so had it in view to secure the benefit of the mortgage. *Held*, that he must be regarded as having taken the bills at the time when he elected to retain them, and not

at the time when they were delivered to him, and to have taken them therefore, with notice of the rights of Q.: *Id.*

A covenant not to sue, is in equity a release: *Id.*

Where two persons unite as petitioners in a bill of equity, if either is not entitled to relief, the bill must be dismissed as to both: *Id.*

SUPREME COURT OF MASSACHUSETTS.¹

Conveyance in Fraud of Creditors—Evidence—Interest on Judgment.—For the purpose of proving a fraudulent intent on the part of a grantor of real estate, evidence is competent to show that, on the same day of making the conveyance in question, he conveyed to near relatives all his other real and personal estate not exempt from seizure on execution; but evidence of his subsequent acts and declarations is incompetent: *Taylor vs. Robinson.*

In levying an execution upon land, interest on the judgment may be computed to the time when the levy is completed: *Id.*

Fire Insurance—Representations in Application, when Warranty.—One who accepts a policy of insurance in which it is expressly provided that it is agreed and declared that the policy is made and accepted upon and in reference to the application filed in the office, is thereby concluded from denying that the application is his, and cannot set up that it was made by an agent employed by him to procure insurance upon his property, but without authority to bind him by representations in the application: *Draper vs. Charter Oak Fire Insurance Company.*

A denial in the application that incumbrances exist upon property to be insured, in reply to a direct inquiry upon that subject, when in fact mortgages thereon do exist, and are known to exist by the applicant, will avoid a policy issued on such application by a stock insurance company, for a premium fully prepaid, if the policy states upon its face that it is agreed and declared that it is made and accepted upon and in reference to the application, and to terms and conditions of insurance annexed, one of which provides that such application shall be taken and deemed to be a part of the policy, and a warranty on the part of the assured; although the application contains also a provision, at the end of it, that the applicant covenants that "the foregoing is a full, just and true exposition of

¹ From Charles Allen, Esq., State Reporter.

all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured, so far as the same are known to the applicant, and are material to the risk :” *Id.*

Easement—Equitable Jurisdiction.—The right to use land for a mill-yard may exist as an easement, for the disturbance of which a bill in equity may be sustained : *Gurney vs. Ford.*

A bill in equity, seeking relief for an obstruction of a way to the plaintiff’s mill, and alleging it to be a public way, is not sustained by proof of the existence of a private way : *Id.*

Assumpsit—Tender—Contract—Action.—One who has paid a portion of the price for a piece of land, under an oral contract for the purchase thereof, and is ready and able to pay the residue upon delivery to him of a deed of the land, according to the terms of the contract, may recover back the money so paid by him without proving a formal tender of the residue of the money, if the vendor, upon request by the vendee, has refused to perform his part of the contract : *Cook vs. Doggett.*

If one enters into possession of land under a verbal contract for the purchase of the same, and cuts the grass thereon, and puts it into the owner’s barn without being requested by the owner to do so, and the owner afterwards refuses to fulfil the contract, no action lies to recover for the expense of cutting the grass : *Id.*

Mill—Right to Erect Dam—Prescription.—The owner of land through which a stream of water passes, may lawfully build and maintain upon his own land a dam across the stream, for a fish-pond, although he thereby prevents the flowing back of water upon his land from the dam of a mill-owner below, which has not been maintained long enough to give a right by prescription : *Wood vs. Edes.*

Husband and Wife—Presumption of Legitimacy.—The presumption of the legitimacy of the child of a married woman can only be rebutted by evidence which proves beyond all reasonable doubt that her husband could not have been the father : *Phillips vs. Allen.*

A child born in eight months after marriage will be presumed to be legitimate, although, when born, it has all the physical appearances of a full grown and natural child ; and proof of a statement by the mother that she had no connection with her husband before marriage, and that her reputation for chastity was bad at the time of her marriage, and that

for some months previously thereto she had been intimate with other men, if competent, is insufficient to rebut this presumption : *Id.*

Promissory Note—Indorsement without Recourse.—An indorser of a promissory note may limit his liability by adding to his name the words "without recourse," at the time he indorses the note, and if he has done so, parol evidence of the fact is admissible, although the note was afterwards indorsed by another person, and the indorsee took it without knowing that the limitation was applicable to the first indorser : *Fitchburg Bank vs. Greenwood.*

Trustee Process—Pleading.—A plaintiff is not entitled, as of right, to litigate anew on a *scire facias* the sum for which one summoned as trustee, in a trustee process, shall be charged, if that question has been tried and determined in the original suit, and the amount paid for which the trustee was there held chargeable : *Brown vs. Tweed.*

NOTICES OF NEW BOOKS.

A TREATISE ON THE AMERICAN LAW OF REAL PROPERTY. By EMORY WASHBURN, LL.D., University Professor of Law in Harvard University. In two volumes. Vol. II. Boston: LITTLE, BROWN & Co., 1862.

Professor Washburn's second volume upon the Law of Real Property is just issued by that extensive law-publishing house, Messrs. Little, Brown & Company, in their usual good style of law publications; and it will be sufficient recommendation of the book, that it comes fully up to its predecessor of the same work. For that volume, although not aspiring to any claim of originality, either in material or composition, has truly proved one of the most useful additions to law libraries throughout the country, which has been offered to the profession. Its arrangement was simple and natural, and at the same time sufficiently technical. Its style, plain and perspicuous, and its contents thorough and exhaustive of the topics discussed, so far as is practicable within reasonable limits. The same is equally true of the present volume.

We beg indulgence both of the author and the profession, to name one excellence of both these volumes, which, whether complimentary or not, certainly ought to be so considered, and is a great desideratum in any treatise upon the Common Law of Real Property. We mean the intelligible

and untechnical form in which the whole subject is presented. We notice the citation of the first volume by the most eminent jurists throughout the country, almost as a book of authority, which we attribute, in a great degree to the very clear and satisfactory manner in which the most abstruse questions are there handled. We have had occasion to compare the first volume, upon some questions of considerable difficulty, with the authorities early and late, as well those not cited by the learned author as those which were: and we have been surprised at the unusual distinctness with which, in all cases, we have found the true principles evolved in the work.

Those who comprehend the matter at all, will easily perceive that it is by no means certain that the book, which is the most easily understood and the freest from abstruseness and technical jargon, will, on that account, cost the author less labor. It generally happens that those chapters in a law book which cost the author, comparatively, the most labor, are precisely those which exhibit, to the careless observer, the least evidences of hard work and severe thought; so that we may safely calculate, as a general rule, that law books which save labor to the profession cost labor to the authors just about in the same proportion. And judged by this test, which we deem a fair one, both in a literary and practical point of view, the entire work of Professor Washburn on Real Property is justly entitled to high commendation.

I. F. R.

REPORTS OF CASES DETERMINED IN THE SUPREME COURT OF THE STATE OF ILLINOIS, at April and November Terms, 1860, and January and April Terms, 1861. By E. PECK, Counsellor at Law. Vol. XXV. Chicago: E. B. MYERS, 1862.

We have here the twenty-fifth volume of the Illinois Reports, containing more than one hundred and fifty cases—many of them of considerable interest, and involving questions not before settled in that State. Mr Peck has been the Reporter for many years, and his long experience, with his thorough knowledge of the profession before, and his extensive general culture, has made him one of the most accomplished Reporters in the United States. And this volume is all that it could be made, doubtless, under the circumstances. But there are, nevertheless, some defects, growing out of the unreasonable demands of the public or the profession, or both, which bid fair, at no distant day, unless reformed, to ruin the character of the American Reports.

One of these is the necessity of reporting every case determined, which involves the absurdity of treating an unimportant case, or one where no

new question of law is involved, or perhaps none at all, as equally interesting to the profession at large, with those leading cases where new questions are determined, or new applications of familiar principles illustrated. Whereas the fact is, that the former class of cases are of no interest to any except the parties, or their counsel, and ought not, therefore, to be allowed a place in the Reports of the State, whereby the number of volumes is more than doubled, and their quality proportionally deteriorated.

Another defect in the later American Reports is the entire disregard of all reference to authorities, whereby the decisions themselves become of no authority beyond the limits of the State where rendered. This is often owing to the arbitrary enactments of general statutes, requiring the opinions to be furnished the Reporter and the public, sometimes, in a few days or weeks, at most, after their delivery—thus affording no time for the judges to revise their hasty notes, made upon the circuit. These two sources of deterioration, with one or two others, which we shall not discuss here, will, in the end, we fear, render our American Reports as useless as they already have become numerous, conflicting, and confused in their contents.

But the reporter and judges seem to have done all that could have been expected, in the present volume, to maintain the highly creditable character which the Reports of that State had already acquired. If a large proportion of the cases could have been entirely omitted, and the important questions involved in the others more thoroughly discussed, it would have added greatly to the value of the volumes, and could not fail, in the end, to be more acceptable to the profession, both within and without the State. But we understand the volume is prepared in obedience to existing statutory requirements, which were devised by men, doubtless, wholly unacquainted with the actual defects or proper remedies in that department. And we have precious little expectation that anything which we could say will be likely to reform such abuses. The disease is too deep-seated and too much diffused for any hope from remedies of that character. It must have its run, and find its cure by exhaustion of the virus. It is of the character of many others which beset the body politic, of a very malignant type, and extremely contagious, but which is not generally liable to a second recurrence in the same patient. It seems to be, at present, in a very mild stage, especially in the State of Illinois; but it prevails extensively throughout the country, and in some localities is seriously fatal to all advancement in juridical knowledge or in rational reform.

I. F. R.

THE

AMERICAN LAW REGISTER.

APRIL, 1862.

THE JURISDICTION OF THE COURT OF CHANCERY TO ENFORCE CHARITABLE USES.

(CONTINUED.)

In the January number of this magazine, we had discussed the power of Chancery to enforce a will created upon a feoffment to uses. We had shown that wills were made in this manner from an early date, that they could, in the reign of E. IV., be enforced not only against the feoffee but against his heirs, and that Lord Bacon's statement to the contrary could not be relied upon as accurate.¹ It was also shown that if land was ordered to be sold, the ordinary or court of probate had nothing to do with the will, but that the direction could be carried into effect only by the Court of Chancery. The conclusion was arrived at that every use named in a will, based upon a feoffment to uses, could be established in that Court. The subject of a trust created upon a will of land made under the custom of London and other localities remained

¹ Additional authorities to those then cited are the following: Fitz. Abr. tit. Subpoena, pl. 8, 14; a case is there cited from 14 E. IV., directly deciding the point. It is also said by the Lord Chancellor in the Year Book, 22 E. IV., that there were then records in chancery, in which a suit had been brought against the heir of the feoffee. The case in Fitzherbert is also cited under the title "Age."

to be examined, as introductory to the discussion of the "uses" which could be enforced under the title of "charities."

By the custom of London, land could be devised from the earliest period. The power of its citizens to make wills undoubtedly was a relic of Saxon jurisprudence. The devise could be made by any owner of land, whether a citizen or not, and was as the reporter in the Year Book, 11 H. VII., 2, expresses it, an incident to the land. The devise was in the nature of a conveyance, and a charitable gift would have been obnoxious to the statutes of mortmain,¹ had it not been for an express rule extending only to *freemen of the city*, allowing a devise to be made in that manner.

These wills were largely made for charitable purposes of various kinds. It was common to give power to executors or other persons to sell land, and to appropriate the money to charitable uses. This was probably done in many cases to evade the statutes of mortmain where those were applicable. The devise was either that the executors should sell the land, or of the land to be sold by the executors. The transfer of any *legal interest in the land itself* tending to a perpetuity was, in general, contrary to the policy of the law. Thus in 40 Ass. (Ed. III.) 26, a devise of land having been made to H. C. and his heirs forever to pay annually twelve marks to provide two chaplains to sing forever for the soul of the deceased, it was held to be within the mortmain act as being in the nature of a perpetual *rent-charge*, while a provision in the same instrument to pay a certain annual sum to the rector was not illegal. The ordinary or bishop had nothing to do with a will of this kind, so far as it concerned real estate. It was strictly a conveyance. In the city of London it was necessary that the will should be proclaimed and enrolled at Guildhall. The fact of enrolment might be certified by the mayor or recorder of the city to any court where a question concerning its validity arose. "All the testaments by which any tenements are devised may be enrolled in the Hustings of Record,

¹ The mortmain acts were first passed in the reign of Henry III. 9 id. 36, and in subsequent reigns to the time of Richard II. Their object was to prevent certain corporations from acquiring real estate.

at the suit of any who may take advantage by the same testaments, and the testaments which are so to be enrolled shall be brought, or caused to be shown before the mayor and aldermen in full Hustings, and there the said will shall be enrolled by the sergeant, and then proved by two honest men well known, which shall be sworn and examined severally of all the circumstances of the said will, and of the estate of the testator and of his seal, and if the proofs be found good and true and agreeing, then shall the same will be enrolled upon record in the same Hustings."¹

In some localities the proceeding was not so formal.²

It was also the custom in London to require the executors of such a will to find sureties for the faithful performance of the trust, or in default thereof to be committed to jail!³

The remedy for the failure to fulfil the charitable duties imposed upon an executor under such a will, was very imperfect before the jurisdiction of chancery was thoroughly established. The heir could enter upon the executor, if he was in possession and was unwilling to perform the will of the deceased. This could be done only when the alms had not been distributed for two years, and if the executor performed his duty before judgment he would retain the land.⁴

What the precise remedy, before the rise of the Court of Chancery, was in case the land was actually sold, and the money was not devoted to the designated object, is not clear. In one case, an

¹ Ancient Usages and Customs of London, p. 157, bound with Calthrop's Reports, London, 1655.

² As indicating the broad distinction, in respect to probate, between *all* wills of real estate and of personal property, it may be noticed that separate wills disposing of the different estates were made at the same time referring to each other: Two of these, which contained so many of the seeds of litigation that no lawyer could pick them out, were construed by statute 21 H. VIII., 810. The wills are given at length in 8 Statutes of the Realm, 810, &c.

³ If a devisee was kept out of possession, he was entitled to a writ of "*ex gravi querela*," which was like a writ of right at common law.

⁴ *Liber Assisarum*, 89 E. III. p. 236, pl. 17; Statutes 18 E. I. c. 41; 6 E. I. c. 4. There is here an element of equity, as in the case of a tenant who does not pay rent, and who brings the amount into court before judgment.

action of debt was brought against such an executor for the proceeds. It might, perhaps, be urged that the money became assets after the sale, and was to be controlled by the ordinary. Such a claim by the ordinary would have been an usurpation. The statute of 21 H. VIII., ch. 5, sec. 3, is directly opposed to it. "If the person deceased will by his last will and testament any lands, tenements or hereditaments to be sold, the money thereof coming, nor the profits of the said land for any time to be taken shall not be accounted as any of the goods or chattels of the said person so deceased." This statute, which seems also applicable to wills made by feoffments to uses, was drawn by Sir Francis More, then Lord Chancellor.¹ It cannot be supposed that in a statute intended for redress of abuses an undisputed right was taken away from the ordinary. This doctrine was confirmed in the fourth and fifth years of the reign of Philip and Mary. It was then held that the Ecclesiastical Court had nothing to do with the money arising from a sale of land.² So it was said at a later period, that "the ordinary could not meddle with money produced on a sale of land. Courts Christian cannot hold plea of a legacy in equity. The money *must be sued for in a Court of Equity*."³ If a feoffee to uses sold the land, retaining the money, and died, *his executor* could be compelled in Chancery to pay it. This was decided in the reign of Henry VI. It is thus shown that from the earliest period, decrees in Chancery could be made against executors upon the footing of a trust.⁴

Having thus ascertained that the bishop or ordinary was not concerned in any form in probate of wills of land or in enforcing their execution, our next inquiry is, as to the fact whether a trust could be created in a common law or customary will. It would seem that

¹ 1 Campbell's Lord Chancellors, p. 442.

² Benloe's Rep. 21.

³ Edwards vs. Graves, Hobart R. 265.

⁴ Moor, 552, said by Egerton, Ld. Ch., to be found in a record in 34 H. VI. "Egerton vouched a case of which he had a copy out of the Tower that a feoffee to uses, sold the land and died, and it was decreed, in Chancery, by the advice of all the Judges in England, that the cestui que use should have the money from the executors of the feoffee." Robes vs. Bent., Moor R. 552.

no doubt could be entertained upon general principles, because the devise operated as a conveyance without the necessity of livery of seisin. The executors, when they had an estate in the land, were clearly trustees, or in the nature of feoffees to uses. Charitable uses must have been created in this way, and, as trusts, were not obnoxious to the mortmain acts, unless given to *corporations*. In fact one of the objects of the statute of wills, passed in the reign of H. VIII., was to facilitate devises to charitable uses. Thus, in that section of the statute which allowed land to be devised for the preferment of a wife, the payment of debts and *otherwise*, it was held by the Court that the word "otherwise" was to be applied to charities.¹

But there is direct proof that a trust could be created upon a customary will at an early period. A case involving this question was decided in 30 H. VI. in the Exchequer Chamber. It was stated to the Court of Exchequer that a citizen of London, by his testament, enrolled at the Hustings of London, had devised certain tenements within the city to his son and three others, in fee, and his will was, that one of the three should have all the profit of the said land during his life. Now, he who had the profit was dead, and the heir brought his bill in Chancery, complaining that the said devise was *in trust*, and prayed that the others should release to him, &c. It was urged by the defendants that, as by his testament the testator had devised the lands in fee to the four, and by the same devise, it was his will that one should have the profits during his life, it sufficiently appeared that the others were to have the fee, and that the case was not like a feoffment in which no will was expressed. Fortescue, J., said: "I know no difference between a feoffment and a devise as to this point, so that if you do not deny that it is a case of trust, there is reason that you should release to the heir," and this all the judges conceded.² This case is valuable, as showing that the court did, contemporaneously with the earliest recorded decisions upon wills made upon feoffments to uses, hold the same rules applicable to devises made according to custom.

¹ Crompton on the Jurisprudence of the Courts. The reference has been mislaid.

² Statham Abridgment, tit. Devise, Ed. 1470.

In the reign of Henry VIII. lands were made devisable by statute.

The principles applicable to customary wills were at once extended to wills made under this act. Probate before the ecclesiastical judge was unnecessary. In fact, this new law made common to England a power which had previously existed in certain sections of the country. There can be no doubt that if the statute of wills had been passed before the statute of uses, instead of after that period, land could have been given in that method to uses as well as by feoffment. Most of the principles of the common law, respecting wills of land, had been deduced by the judges long before the statute of H. VIII. For nearly five hundred years questions of that kind had come before the courts, and the Year Books are full of decisions enunciating the well-settled rules of law upon the subject of devises.

Having thus ascertained that a customary or statutory will could be made as well as a feoffment in such a manner as to create a use, we may examine the application of this subject to the law of *charities*.

It seems entirely clear that a use for charitable purposes would be enforced whenever the object was definite. If a use was declared to a definite person or persons, they could demand, in the Court of Chancery, that the direction should be carried into effect. Thus, it was said in the Year Book 15 H. VII. 12, if the will was that the feoffees themselves, or the executors, shall sell the land to J. S., now J. S. can, *in Chancery*, compel a sale to him.¹ The term "J. S." is put as the broadest possible expression to denote that the sale can be demanded by any one to whom the use is given for it had been previously stated that *creditors* could compel a sale which had been directed for their benefit. Again, if the land has been given to definite persons for the use of an indefinite body, as for example, to feoffees for the use of the poor, it seems beyond dispute that such persons could, in Equity, take the property, and hold it for the charitable purpose.

It may be admitted, at the outset, that the rule at law was other

¹ Crompton, Jurisdiction of the Courts, title Chancery, p. 54, Ed. 1637.

wise. No direct gift could be made to an unincorporated body. One of the earliest cases in which this question was discussed at law, was that of the Whitawyers.¹ A devise was made under the custom of London, to two of the best men of the Guild or Fraternity of Whitawyers for ever, to find a chaplain to sing for the soul of the testator. The devise was not contrary to the mortmain law, and the only question was as to its legal validity, the Guild being an unincorporated association. The question came up before the court on a claim that the land had escheated to the king, the testator having died without heirs. This was, of course, a pure legal question. It was evident that this devise was void for uncertainty as a patent ambiguity, unless the theory of the counsel for the fraternity could prevail, which was that the "Whitawyers" must take as "an association," and that their wardens might be treated as the "two best men." The whole argument turned upon the question, whether an unincorporated body could take land for such a purpose? The court held that it could not, and that the land had escheated to the king. Knivet, Chancellor, said: "It cannot be by the law that this community, which has no charter from the king, can be adjudged a body to purchase an estate of land."

This case decides no more than that a direct conveyance of land cannot be made to an unincorporated body.

Could a use be given by the rules of equity to such a body either for its own sake, or to hold for others?

It would appear at first thought, upon principle, that it could not. Though a use was not recognised in a court of law, yet, in equity, it had many of the qualities of real estate,² and was descendible to the heir of the owner. One of its essential elements, in general, was that the beneficiary or cestui que use could call upon the legal owner to make a title. If a use in land were given to an unincorporated association, the feoffees evidently could not convey to the unincorporated body, because they were not able to hold

¹ Year Book 49 E. III. 8.

² A use followed the nature of the land. In cases of Gavelkind, children took the use equally by descent; in borough English, the youngest inherited: Year Book 14 H. VIII. 6.

land. The anomaly would then be introduced of a cestui que use who had not the capacity to acquire the legal title. This view, however, is not decisive, both because there always were uses which could not be turned into legal estates, and because the court may have established different rules in regard to charities from those which prevailed in other cases. The question must, therefore, be solved simply upon the authorities.

A very important case upon this subject will be found in the Year Book 12 H. VII., pages 27, 28, 29. This case is to be particularly noticed for two reasons, *first*, as showing what the view of the *Law Courts* was as to the power of an unincorporated body to take a use, and *second*, as proving that a *parish could not, in general, be regarded as a body capable of holding land*. If a corporation at all, it was only such *sub modo*, and not for this purpose.

In the case in question, land had been given to a parson for the use of the parishioners of a certain parish. This was after the statute of Richard III., c. 1,¹ which allowed the cestui que use to make a conveyance as owner. The churchwardens assumed to make a lease of the land, and the question was, whether the lease was valid. It will be observed that two points arose; one was whether the parishioners could take a use, and the other was whether the churchwardens could act for them. Although the case came up in a court of law, it was necessary to decide whether the gift was so far valid in *equity*, that the statute of Richard might operate upon it. As this case has not been cited in the recent arguments upon this subject, it will be noticed at some length. The counsel opposed to the parishioners urged that they were not a corporation, and had no capacity to take. On the other hand, it was said that the fee simple was in the feoffee, and that the right of the parishioners was only a use or matter in equity, and consequently valid. Frowicke, J., said that it was necessary to have a person competent to accept the gift, and this could be in two methods:

¹ It is said in one place that before this statute, a will of land made by *cestui que use* was not good, save that the feoffee of his own will could act accordingly. This, however, must have referred to validity *at law*, (see context,) Year Book 16 H. VIII. 10; 14 H. VIII. 7.

either by a known name of inheritance, or by a corporate name. Rede, J.—“In my opinion, this is a void use. The parishioners have no capacity. If a feoffment should be made to the use of a fellowship of a given city, it would be void.” Distinctions were taken between the Guilds and fellowships of London, which were corporations, and unincorporated societies. Fineux, C. J., distinguished between certain gifts of *personal property* which the parishioners were bound by law to acquire, and were therefore capable of holding, and uses in land which they could not acquire. Crompton, an accurate writer, cites this case for the proposition that parishioners could not take either at law or in equity, and that the land was held to the use of the feoffor.¹ It was only necessary to decide, however, that it was not *such* a use as would entitle the cestui que use under the statute to make a conveyance as owner.

The same general proposition has been thought by some to be indicated in the Year Book 15 H. VII., p. 12. It is there said by all the Justices, that although if land were ordered to be sold under a will created by a feoffment to uses, and the proceeds directed to be paid to J. S., the latter person could compel the sale to be made in chancery; yet if his will is that his feoffees shall alien his land to obtain money, *to distribute, &c.*, that now no one can compel them to make alienation, because no one *is damaged* for want of alienation. The words “to distribute, &c.,” usually mean, in the Year Books, to distribute for the soul of the deceased. Too much stress should not, however, be laid upon this passage. Though the language might have included charitable gifts, yet the reason given is not apt. The Judge (Fineux) would have said that the *want of capacity* was the reason why the direction should not be enforced, as he had argued *that* question but a short time before in the case already cited. The language should be confined to gifts for saying prayers for the soul of the deceased, and other like provisions, and then the reason that no person is damaged is applicable. No proceeding could be instituted in behalf of the deceased. Besides, if the words “to distribute, &c.,” are extended

¹ Jurisd. of Courts, 1594.

to *all* charitable gifts, the statement was incorrect, for some uses, not indefinite, could certainly be enforced in chancery.

The decision in 12 H. VII., p. 27, however, is clear to the point, and if there were no opposing authorities, based, perhaps, upon peculiar rules concerning charities, it might be thought decisive. Opinions of the early Justices of the common law courts, upon chancery questions against chancery jurisdiction, must be received with caution. They were jealous, in many cases, of the growing power of the Chancellors. It must be presumed that, in many cases, they did not understand the subject. Lord Bacon, with his rare sagacity, had a clear insight into this point. Says he, in an address to the committees of conference in the Lords and Commons: "The law of England is not insociable, but is advised by other sciences; in words, by grammarians; in matrimony, by civilians; in minerals, by natural philosophers; in *uses*, by *moral philosophers*."¹ The reporter in the Year Books, in one instance, candidly admits his defective knowledge.² "A good point was made by Vavisor, J., but I did not understand the case well. Marrow, of the Temple, knew it well, for he was counsel." There seems to be an implication here that a lawyer must have been counsel to understand an equity case. The ignorance was doubtless found in others who were not so candid. The common law Judges had at this time little occasion to study the theory of uses. They steadily ignored them in their system of jurisprudence. The "*moral philosophers*" of that day must have been the clerical chancellors, and as a general rule, their opinions upon equity cases must have prevailed.

Having stated the authorities opposed to the enforcement of uses for an indefinite body, the following suggestions are presented in favor of upholding them:

1. Gifts of a charitable nature prevailed from an early period. One of the earliest known instances is found in Sir John Philpot's will, once Lord Mayor of London, (anno 1381.) The phraseology of this early charity may be reproduced. It consisted of a reve-

¹ Moore R. 791.

² It is not, perhaps, generally known, that a very considerable number of equity cases are to be found in the Year Books, interspersed with the decisions at law.

nue issuing from land. "I give to five poor men, in honor of the five wounds of Jesus Christ, and to five impotent and poor women, in honor of the five joys of the Virgin Mary, one penny each per day." The amount was to be paid by his wife, and the beneficiaries selected by her while she lived. After her death the trust was to be administered by the Mayor of the city for the time being. It is now managed by the City of London, with about twenty other similar charities.¹ From that time the reports of the English Commissioners of Charities are full of instances where individuals held property, both real and personal, under such directions, for a century or more before the statute of Elizabeth. These were often foundations in the sense of the Roman law, feoffees being directed to keep up their number by new conveyances, as it was diminished through death and other causes. Thus, in the parish of Great Dunmow, a trust was created in 17th Richard II. (1394,) by a conveyance to feoffees, who continued their number through intermediate conveyances for more than two hundred years. It is very difficult to suppose that gifts of this kind, existing by succession until the present day, scores of which, before 1600, were found in every county of England, remained from one to two hundred years without legal enforcement.²

2. The statute law, in a number of instances, indicates the existence and enforcement of charitable uses, provides more perfect means of redress, or restrains their operation and effect. No hint is to be found anywhere, that they are less valid than other uses. Thus, in the second year of the reign of Henry V. (1414,) it is recited in a statute that hospitals had been founded by the King, lords and ladies, as by others of divers estates, to the honor of God, *in aid and merit of the souls of the founders* who have given a great part of their movable goods for the building of the same, and a great part of their lands to sustain impotent men, lazars, men

¹ A list of these will be found in the Analytical Digest of the reports of the Commissioners of Charities.

² 29th Report of Commissioners of Charities, p. 176. More than fifty cases of the same kind are found in this one report, the charities having been created before 1600.

out of their wits, poor women with child, and to nourish, relieve or refresh other poor people. These had decayed, and the funds had been withdrawn by divers persons to other uses. It was provided that, as to the foundations of the King, the ordinaries, by commission, should inquire and certify their inquisitions into chancery; and as to other hospitals, which are of another foundation and patronage than of the King, the ordinary shall not only inquire of the manner of foundation, estate and governance of the same, but also correct and reform them. This power of visitation is quite analogous to that of the Roman law—every *manner of foundation* is included. Stat. 2 H. V., c. i. So in 21 H. VIII., c. 4, the legislature remedy a defect in the law occasioned by the refusal of some one or more of the executors to act upon a will made through feoffments to uses. The opinion had become prevalent, that if executors were, under such circumstances, ordered to sell lands, the trust or direction could not be enforced. This doubt arose as to *all* directions of this kind, and the grouping of the different objects for which such sales might be made is instructive. “Whereas divers sundry persons, before this time, having other persons seised to their uses, of and in land and other hereditaments, to and for the declaration of their wills, have, by their last wills and testaments, willed and declared such land to be sold by their executors, as well to and for the payment of their debts, performance of their legacies, necessary and convenient finding of their wives, virtuous bringing up and advancement of their children to marriage, as also for *other charitable deeds to be done by their executors for the health of their souls*; notwithstanding such *trust* and confidence, some have refused to intermeddle, &c., by reason whereof, as well the debts of such testators have rested unpaid and satisfied, to the great damage and peril of the soul of such testators, and to the great hindrance and undoing of their creditors, as also legacies and bequests made by the testator to his wife and children, and for other charitable deeds to be done for the health of the soul of the testator, as well unto the extreme misery of his wife and children, as also unto the let of performance of other charitable deeds for the health of the soul of said testator, *to the displeasure of*

Almighty God." Provision is then made for cases of this kind in the future. Some of these uses, such as for the payment of debts, had, as all will admit, long been enforced in equity. But the same doubt in this case of refusal to act hangs over all alike. This statute is conceived in the spirit of the time. The principal reason for the amendment of the law grew out of the danger that the testator's soul might be lost by a neglect to fulfil his directions. By a singular *non sequitur*, the misconduct of the living occasioned the loss of the soul of the deceased. While such a feeling animated the Parliament, can it be believed that charitable uses remained for centuries unenforced?

This statute is of great importance, as disclosing the fact that "charitable deeds for the wealth of the soul" already existed as a *class* more than fifty years before the statute of Elizabeth, and consequently could not have been introduced by that statute. No one who has studied the Year Books or the reports "of the Commissioners of Charities," can entertain any doubt that those words indicate what is now understood by the term "charitable uses." This statement is confirmed by the statute of Henry V., which declares hospitals to have been founded in aid of the souls of the founders.

But charitable gifts not only were recognised, but could be made to unincorporated associations or persons. These had become exceedingly common. A certain class of them had become obnoxious—those which in evasion of the statutes of mortmain, had been created for perpetual obits, or continued service of a priest forever. These are stated in the preamble to the 23 H. VIII. c. 10, to have been made to the use of unincorporated persons, to receive the rents and profits of land, so that the king was as much prejudiced as in case where *lands were aliened in mortmain*. This is the strongest possible admission that they were treated by the court as valid. Says Lord Bacon: "By this statute a further remedy was given in a case like unto the case of mortmain, for in the statute 15 R. II., remedy was given where the use came *ad manum mortuam*, which was when it came to some corporation; now, when uses were limited to a thing apt or

worthy, and not to a person or body, as to a corporation of a church or chaplain, or obit, but not incorporate as to priests, or to such guilds or fraternities as are only in reputation, and not incorporate, the case was omitted, which, by the statute was remedied," &c. The statute then admits the original validity of such uses by enacting that henceforth they shall be void, except for twenty years. This provision as to their validity for twenty years is not a *new* rule, but only permissive as at common law.¹

The object of this law plainly was to suppress this class of superstitious uses only. Mr. Froude, in his accurate history, expressly confines its effect to that class of cases.² So Sir William Grant limits its effect to estates of land given to churches and chapels.³ It is difficult to conceive, after the strong language of the Parliament, two years before, that it was intended to impair the effect of the testator's "charitable deeds." It is worthy of observation that the words of the first statute are entirely avoided in the second. We have, then, within this brief period of two years, as many distinct expressions from Parliament upon this subject. Charitable uses are recognised and enforced. They ought to be sustained to unincorporated persons, though they create a *perpetuity*. True, there is the *same inconvenience* as in case of mortmain. Some of them, such as obits, should be limited to twenty years, because they are strictly for individual advantage, without any corresponding general good. The others should continue as permanent foundations. The line is now for the first time drawn—a line hereafter to become sharp and decisive—between superstitious uses and true charities. Ultimately, the former, which are now restricted to twenty years, will be suppressed. But the legislature and the courts will continue to recognise "*Godly uses*." The judges will distinguish in the same instrument between the two, separating the tares from the wheat. It was held in Cro. Eliz. 288, that the statute did not affect schools or alms-houses.

¹ Boyle on Charities, 254; 2 B. & A. 102.

² Froude's History of the Reign of Henry VIII., vol. 1, p. 352.

³ Cary vs. Abbott, 7 Ves. 495; 12 Mod. 31; Boyle on Charities, 243.

It would then appear, that before the statute of uses, and while wills of land were "customary," a direct devise to an unincorporated body was void *at law*. Consequently, no such disposition could be made under a *customary will*, unless a trust was created. A devise could be made of a use to an unincorporated association, either by a will made, declaring the uses of a feoffment, or by a customary will if a trustee was interposed.

The effect of the statute of uses and of the statute of wills must now be noticed. The object of the statute of uses was to declare that the owner of the use should have a legal estate of the like quality in the land which he had previously had in the use. The right to create a use was not abrogated, but simply the *effect* of the transaction was declared. The courts were soon called upon to construe this statute. They held, by a process of refined reasoning, that the statute did not extend to all uses; but that certain conditions were necessary to the transfer of the legal estate. Consequently, as *every use can be created since the statute which could be created before*, and some uses cannot be turned into legal estates, it follows irresistibly that all such as cannot be converted under the statute, must, as before, be enforced in Chancery. The tests to determine whether a use could be made a legal estate, were,—First, that there must be some person seised to the use; Second, that there must be a cestui que use in existence, or *in esse*; Third, that there must be a use in existence or *in esse*. In examining the second condition, Mr. Cruise says accurately: "The second circumstance necessary to the execution of a use by this statute, is that there must be a cestui que use in esse. If, therefore, a use be limited to a person not in esse, or to a person *uncertain*, the statute can have no operation." The word "uncertain" as contrasted with a person not in existence, must refer to unascertained persons, as, for example, a gift to trustees for the use "of the poor." The language of Mr. Cruise is very guarded. He admits that the use is valid, but that it remains unaffected by the statute.¹ So Lord Bacon, in his reading on the Statute of Uses, says: "The statute excludes dead uses, which are not to bodies

¹ Cruise's Digest, Tit. 11, Ch. 8, § 7-29.

lively and natural, *as the building of a church or the making of a bridge. It is ever coupled with body politic.*"¹ And again, "when- ever the statute speaketh of the feoffee it addeth person; when it speaketh of the cestui que use, it addeth *person or body politic*," so that every use to an unincorporated body would remain unexecuted by the statute and a trust. Besides, upon the theory of active trusts, which were never executed, the feoffees to charities would usually have duties to perform inconsistent with the execution of the trust. The income would often be employed so as to create a *foundation*, and the feoffees must hold the legal estate in order to pay over the rents to the persons entitled.²

It is evident, however, that the practice of creating feoffees to uses for the purpose of making a will, could no longer be resorted to. The legal title would, as soon as the feoffment was made, revert to the owner. For the five years intervening between the passage of the statute of uses and the enactment of the statute of wills, no charitable foundation in land could be created by will, except where there was a custom to make wills. As soon as the statute of wills was passed, charities could again be established. It is entirely clear that if a competent devisee was selected, he could take the legal title by the will, and become a trustee for an indefinite body circumscribed by a given locality, as the poor of the parish. As already remarked, the use would not be executed, and would constitute a trust. This is distinctly stated by Mr. Spence, who is no friend to the enlarged jurisdiction of the Court of Chancery upon this subject.³ The indefinite body, through one or more of its members, could call the feoffees to account, and establish the trust. Upon similar principles a trust of this kind could be created by act *inter vivos*.

This point is so vital in the consideration of this topic, that authorities should be cited. The first which will be noticed are those derived from the Record Commission.⁴ All the authorities

¹ Bacon's Works, Montague's edition, 18 Vol. 340. Pickering, London.

² See the case of *Arnold vs. Barker*, cited *infra*.

³ Spence Eq. Jurisd., vol. i., 589, citing various authorities.

⁴ This commission was, as is well known, created for the purpose of preserving and arranging the public records of England.

found in the volumes of the Commissioners have been collected in a note to *Vidal vs. Girard*, 2 How. U. S., 155. The great result derived from all these cases is, that a charitable use could be given, after the statute of uses, to a definite person, for an indefinite body of persons residing within a given locality; that the use was not executed by the statute, but was enforceable in chancery; that the *indefinite body* could appear by one or more of their number, and could ask the interposition of the court to *establish the trust* against the *holders of the legal title*. Thus, in several cases, one or more of the inhabitants of a *parish* filed a bill against feoffees usually to establish a trust to real estate. Now it is perfectly well settled that a "parish" out of the city of London was *not* a corporation.¹ It is said in Moore's Reading upon the Statute of Charitable Uses, that a deed to a parish for a charitable use was void² (at law.) A devise to churchwardens is also void, (at law.) Though they were a corporation, it was only for special purposes.³ The bill was usually brought by a *single person, in behalf of himself and the co-inhabitants of the parish*.⁴ In some cases the application was to appoint new trustees; in others, to *establish* a charitable donation, conveyed to feoffees in trust for the parish,⁵ or for the support of a charity,⁶ (in the year 1578.) Sometimes the suit was instituted by churchwardens on behalf of the parish. In one case, certain houses in Oxford had been conveyed to trustees, to repair the church and to relieve the poor, and the feoffees refused to account.⁷ In another case, the suit is to *establish* a charitable donation.⁸ In some instances, *the poor*

¹ Bacon's Reading on the Statute of Uses; Year Book, 12 H. VII., pp. 27, 28, 29.

² Duke on Charitable Uses, p. 189.

³ Duke, 63; p. 82, case 84; Year Book, 12 H. VII., pp. 27, 28, 29.

⁴ Perot vs. Cruise, 1 Calendars in Chancery, p. 159, case 28; Rawley vs. Lewis, do., p. 319, case 51, addressed to Sir N. Bacon.

⁵ Blackwell vs. Spiry, 1 Id., p. 276, case 82.

⁶ Fox vs. Benbe, 2 Id., p. 128, case 55; Whitehurst vs. Warner, 3 Id., p. 291, case 51.

⁷ Smith vs. Smith, 3 Cal. in Chan. 108, case 27.

⁸ Newton vs. Dane, 2 Id. 228, case 65.

themselves were joined as complainants. Thus a messuage and land, called Hooke, in the parish of Writtle, in the year 1500, was given by Thomas Hawkins in trust *for the poor of said parish*. The suit was instituted for the continuance of the charity, against the surviving feoffees, by the vicar, churchwardens and the *poor of Writtle*. The suit was commenced in the year 1596, before the statutes of Elizabeth.¹

It is believed that much of the force of these authorities has been lost in common estimation, from the fact that the distinction between the parishes in and out of London has not been attended to. Every case in which the question arose both before and after the statutes of Elizabeth, holds that a conveyance of land to a parish out of London was void at law. The form in which these suits were brought plainly shows that it was not a corporation.

Without accumulating authorities from this source, enough have been cited to show the judicial recognition of the existence of charitable trusts where the objects were, though indefinite, embraced within some circumscribed territorial division, or consisted of an unincorporated body. The gift in these cases was strictly confined to the poor of the parish.² Special favor was granted to suits for the benefit of the poor. Thus in one case, where the claim was under forty shillings, it appeared that it was "for the benefit of the poor of Drayton," and was consequently not dismissed, though in other cases the suit would not have been heard. This decision was made in the 21st Elizabeth.³

Many additional cases, from other sources, might be cited. Objections might be raised to some, that it was not clear whether they were not under the statutes of Elizabeth, or decided by reason of powers conferred by those acts. Two or three authorities will be adduced, of a satisfactory nature, to which no such objection can apply. The first is the case of *Arnold vs. Barker*, decided by the Master of the Rolls, in the 7 Jas. I., (1607.) It is well understood that the Master of the Rolls would never act under these statutes. He would not even hear any appeal from the commis-

¹ 3 Cal. in Chan. 269, case 56.

² Duke, 158.

³ Cary's Reports, p. 147.

ers, because he was not named in the acts.¹ This case occurred within half a dozen years after the 43 Elizabeth, must have proceeded then upon the inherent jurisdiction of the court. It is not to be claimed that he received a delegated power from the Chancellor, because, as Lord Hardwicke has conclusively shown, he had an original jurisdiction.² The case in question was brought before the Master of the Rolls by original bill. The land had been given to feoffees to hold to the relief of the poor of the parish of St. Bennett. The decree *established the validity*, and directed that *when four of the feoffees were dead, the survivors should convey to four other feoffees, to be selected by the Chancellor, &c., and so on, toties quoties*. This case is remarkable, as showing that *foundations* might be created of a perpetual nature, and were not obnoxious to the rules of law respecting "remote" or so called perpetuities. This case alone would seem to be enough to prove that chancery had an ample original jurisdiction over the subject.³ Symonds's case may be noticed. One Symonds, Alderman of Winchester bargained and sold certain land to Thomas Fleming upon confidence to perform a charitable use, and the said Symonds declared by his last will that Sir Thomas Fleming should perform. The bargain was never enrolled, yet the Chancellor decreed that the heir should sell the land, to be used according to the limitation of the use. This decree was based upon ordinary and judicial equity in the chancery, in the year of the reign of Queen Elizabeth, fifteen years before the test.⁴ Lord St. Leonards has shown that the word "sold," is applicable to the conveyance made by Symonds, means a bargain and sale, which always *needs a consideration*. This case then shows that a Court of Chancery enforced a charity upon the land and that it was not a mere bounty, but was a sufficient consideration to sustain a bargain and sale, and that *the heir could be*

¹ See on Charities, p. 17; *Rockley vs. Kelly*, Precedents in Chan. 111.

² Course on the Judicial Authority belonging to the Master of the Rolls.

³ Volume of the Reports of the Commissioners of Charities, p. 648.

⁴ See's Reading, Duke, 162.

treated in equity as a trustee for the charity. Upon the conclusion derived from this case alone, that great master of real property law, Lord St. Leonards, came to the conclusion that charities could be forced before the statutes of Elizabeth.¹

Still further, there is reason to believe that the *cy près* power of the court was exercised at an early day. This would naturally be anticipated from the influence of the principles of the Roman law upon the rules of Chancery. The bishops, who for many years sat in the Court of Chancery, were entirely familiar with that class of principles. There was every reason to apply them as the same motive, "to benefit the soul," was equally operative under both systems of jurisprudence. A conveyance of lands had been made to a rector and churchwardens, on condition to appropriate a fixed sum to say masses for the soul of the dead. After the statute of Chantries was passed, forfeiting to the crown lands given to superstitious uses, a grant was obtained from the King to one Payne, whose grantee brought his action in the Common Pleas against the rector, &c. This proceeding failed, because as the superstitious uses had not been carried out for six years, the case came within the saving of the statute. The grantee then commenced a suit in Chancery, in 22 and 23 Elizabeth. The rector, &c., showed that they had appropriated all the surplus over the fixed sum, to *good and laudable uses* for the support of the poor, &c. The court established the title of the rector, &c., decreeing a certain rent-charge to the grantee of the King. The case shows that the Court of Chancery was a proper tribunal to enforce this use. The King manifestly only succeeded to the right of the cestui que use. The theory that all surplus income should be devoted to charity in accordance with the modern *cy près* doctrine, seems to be regarded.² Nothing appears to have gone to the heirs.³

¹ Drury & Warren, 809.

² 8 Coke, 180; Boyle, pp. 180-191.

³ Barton's Will, made in 1484. 6th Report of Commissioners of Charities, p. 11. S. C. endowed Charities of the City of London; reprinted at large from the reports of the Commissioners concerning charities, p. 161-2. More than a hundred and fifty charities in London alone, are described in this volume as having been endowed before 1600. Most of them still exist.

The more difficult question still remains, whether, if property was left, after the statute of uses, to an unincorporated body, without the intervention of a trustee, the charity could be upheld? It would seem, however, that if the principle of Symonds's case was correct, a testator might be regarded as devoting his land to the payment of a meritorious claim, and that the conscience of the heir should be so far affected as to fasten the trust upon him. It certainly seems a very narrow distinction, that the form of making a trustee should be vital to the existence of a trust. The only element which seems to be necessary, is that of consideration, and then the maxim becomes applicable, that a trust shall never fail for want of a trustee. Land directed to be sold for the benefit of children was decreed to be sold, though no one was appointed by the testator to make the sale.¹ Heirs are not unfrequently charged with trusts in equity, growing out of directions to pay debts, &c., made in the wills of their ancestors.² Lord Hardwicke decreed in a case of charities, where no feoffees were created, that the heir at law should be regarded as trustee. He applied as against the heir the *cy près* doctrine in the same manner as he would have done in the case of feoffees.³

It still remains to examine the statutes of Elizabeth, the subject of Informations in Chancery, and the extent to which the court enforced jurisdiction in gifts of personal property.

T. W. D.

(To be Continued.)

¹ Tothill's Rep. 121, 39 Eliz.

² Lewin on Trusts, 77.

³ Attorney General vs. Johnson; Ambler B. 190.

RECENT AMERICAN DECISIONS.

*In the Supreme Court of Massachusetts—January Term, 1862—
at Boston.*

AMBROSE MERRILL vs. BOYLSTON FIRE AND MARINE INSURANCE CO.

1. An abandonment of the voyage insured and substitution of a new voyage defeats the policy of insurance from the time of such abandonment, although when the loss occurs, the vessel is sailing in a track or course of the voyage common both to the voyage described in the policy, and in the substituted voyage.
2. Such abandonment may occur after the vessel has commenced her specified voyage.
3. The facts in the present case present a case of abandonment, and not one of an intention to deviate, and the policy was therefore at once defeated when the master of the ship abandoned the termini of the voyage described in the policy, and sailed from Falmouth, bound to Antwerp, as her port of discharge.

This was an action by the assured upon a policy of insurance in the following form,—“six thousand dollars, viz: two thousand on freight of ship Abby Langdon, at and from Newport to Point de Galle, and thence to Akyab. Also, four thousand dollars on freight of said ship, at and from Akyab to port of discharge in the kingdom of Great Britain, at and after the rate of four and one-half per cent. from Newport to Point de Galle and Akyab, and three per cent. from Akyab to Great Britain.”

The ship performed her voyage to Akyab, and while there the master entered into a contract to take on board a cargo of rice, and to proceed to Falmouth for orders to discharge at a port in the United Kingdom or on the Continent, between Havre and Hamburgh inclusive. The ship safely arrived at Falmouth, and the master there received orders to go to Antwerp to discharge his cargo, and in pursuance of those orders and the previous contract made by the master, the ship sailed from Falmouth, bound for Antwerp, as her port of discharge. While the ship was pursuing the voyage to Antwerp by the usual track for such a voyage, on the south side of the Isle of Wight, she was totally lost by the perils of the sea. If the master had received orders at Falmouth to go to any port on the east coast of Great Britain, north of the Isle of Wight, the

ship might, without deviation, have pursued the same course which was followed down to the time of the loss.

It was held by the court that these facts presented a case of abandonment of the voyage insured, and that the ship in sailing from Falmouth, bound for Antwerp, as her port of discharge, had entered upon a new and substituted voyage, and the policy was thereby defeated.

The case was argued by *H. W. Paine* for the plaintiff, and *B. R. Curtis* for the defendants.

The opinion of the court was delivered by

DEWEY, J.—The question is, whether this loss happened in the course of the voyage insured, and while the same was covered by the policy. Certain general principles will be found to have been settled in the adjudicated cases, which will reduce the question now before us to a narrow compass. A well-settled distinction exists between the cases of a purposed deviation, and an abandonment of the voyage. As respects an intention to deviate, if the loss occurs before an actual deviation, the underwriter is not discharged. An abandonment of the voyage and substitution of another and different voyage at once defeats the policy. The point of doubt, and in reference to which there will be found a conflict of authorities to some extent, is as to the facts necessary to constitute an abandonment; or, in another form of stating the point, what class of cases range under the head of an intention to deviate merely, and thus retain the benefit of the policy, if the loss occurs before the departure from the route common to both the port described in the policy, and the port intended to be reached by a deviation.

In this latter class all agree that the more simple and ordinary cases of proposed deviation, occurring under some new motive or purpose arising after the vessel has sailed on her prescribed course, and when the deviation was to be a temporary deviation only, and not to defeat her voyage to the port named in the policy, would furnish a case where the mere intent to deviate would not affect the policy. The weight of authority seems also very clearly

to show that a purpose existing at the commencement of the voyage to put into an intermediate port out of the course of the voyage described in the policy, the original *termini* of the voyage being still preserved, is not the substitution of a different voyage, but only an intention to deviate: *Foster vs. Wilmer*, 2 Strange, 1248; *Marine Insurance Co. vs. Tucker*, 3 Cranch, 357; *Hobart vs. Norton*, 8 Pickering, 160; *Hare vs. Travis*, 7 Barn. & Cresswell, 15; *Parsons on Maritime Law*, 2 vol. 306.

It will be observed that the cases held as mere intention to deviate, embraced in the last proposition, are cases where there was, at no period, any intention to change the termini of the voyage, and the proposed departure from the direct course of the voyage was only to be temporary, and the vessel to resume and perfect the voyage to the port named in the policy.

As to the abandonment of the voyage described in the policy, and substitution of a new one, all agree that when an actual abandonment of the voyage, and substitution of a distinct voyage, has occurred before the commencement of the voyage, the policy does not attach or cover any loss in whatever part of the voyage it has occurred. But as to what facts will constitute an abandonment of the voyage, and at what period of time, in reference to the voyage, it must be determined and acted upon, has been the subject of much discussion and conflict of opinion.

On the one hand, it is insisted that there can be no application of the principles applicable to abandonment, if the alteration of the voyage and substitution of a new one occurs, at any point subsequent to the commencement of the voyage, and that all changes of purpose as to the course of the voyage are to be treated as deviations, or intended deviations, and therefore, if the vessel is lost before the actual deviation, such purpose, however fully settled, does not defeat the policy.

On the other hand, it is alleged, if the ship either originally sail on a different voyage from that described in the policy; or if, after commencing her voyage, she entirely abandoned all intention of prosecuting it, this is a change and abandonment of the voyage, which

avoids the policy from the moment the intention of so abandoning is definitely formed.

To sustain the present defence, it is not necessary to adopt the latter position in the broad terms above stated; but it is necessary to hold that such purpose to abandon may be formed and settled after the commencement of the voyage, and after the vessel has arrived at a port of destination for a part of her entire voyage, and before taking her departure from a port where she lawfully was.

This question was very much considered in the case of *Lawrence vs. Ocean Insurance Co.*, reported in the 11 John. 241, and again in *Lawrence vs. Firemen's Insurance Co.*, 14 John. 46. The first case arose upon a policy of insurance "from New York to Gottenburgh, and at and from thence to one port in the Baltic or Black Sea, not south of the river Eyder." The vessel sailed from New York, and arrived at Gottenburgh; there the port selected for the voyage was Petersburg, and she sailed for Petersburg, and while on her voyage was detained by various causes at Chalchan, and while there changed her purpose and sailed for Stockholm. While pursuing, however, the direct route to St. Petersburg, and before she came to the point of departure for Stockholm, she sustained a loss by capture by the French.

It was held by a majority of the Supreme Court, and confirmed by a majority of the Court of Errors, that it was the case of an intended deviation only, and the vessel having been lost before she had arrived at the dividing point, the insurers were liable.

The conflicting opinions held by the eminent jurists who heard that case, leave it, as respects other tribunals, valuable for its fullness of examination and elucidation, rather than as an authority to guide us. Thompson, C. J., in giving his reason for thus holding, says: "No case can be found where a change of voyage, after the commencement of the one described in the policy has attached, has been held the substitution of a new voyage."

All the judges treat the case as a policy for a voyage to Petersburg, that port being fixed by the selection made by the assured, and taking her departure from Gottenburgh with that purpose.

Mr. Justice Thompson did not deem it material whether the voyage was to be considered as one entire voyage, commencing at New York, or as a voyage commencing at Gottenburgh, his position being, that if commenced at either place it was a commencement of the voyage insured, and with the effect that such after proposed and settled purpose to change the port of destination would, until an actual deviation had occurred, be treated as a mere intention to deviate, and would not discharge the policy.

Mr. Justice Van Ness, while he fully concedes, that where the termini of the voyage are preserved, an unexecuted intention to deviate does not affect the policy, affirms that when the termini are abandoned, and a new and indefinite voyage is determined upon and commenced, the policy ceases to have any effect. Here the *termini* were not preserved, and it must, in his opinion, be treated as an abandonment of the old voyage. He further adds: "in every case where such change of purpose has not been held to vitiate the policy, it will be found the *terminus ad quem* mentioned in the policy was not abandoned, but the vessel intended ultimately to proceed to it;" and he held that it was not material as to an abandonment, whether such change in the voyage was decided and acted upon before or after the voyage commenced.

Chancellor Kent, sitting in the Court of Errors, upon the hearing of the case of *Lawrence vs. Firemen's Insurance Company*, *supra*, held similar views. He held that if the original plan of destination be abandoned in order to go to another port of discharge, the voyage itself becomes changed, because the termini of the original voyage is changed. The identity of the voyage is gone—if the intention to abandon be once clearly and certainly established, it then becomes perfectly immaterial whether the vessel was lost before or after she came to the dividing point, because, in either case, she was lost not on the voyage insured, but a different voyage. He also repudiates the distinction set up between the case of a change of voyage, determined upon before or after the commencement of the voyage.

The case of *Marine Insurance Company vs. Tucker*, 3 Cranch, 357, will be found, upon examination, not to meet the present case,

or to sanction the position taken on the part of the plaintiff. It was a policy at and from "Kingston, in Jamaica, to Alexandria, in Virginia." The ship originally took a cargo to deliver at Alexandria, but subsequently took freight for Baltimore, with intention to go to Baltimore, and from thence to Alexandria; and while prosecuting her voyage with that intent, and while on the direct course both to Baltimore and Alexandria, and before she had arrived at the dividing point between them, was captured, and the court held it was only a case of intended deviation, and that the insurers were liable.

It will be seen that in this, as well as many other cases, when the rule of an intended deviation has been applied, that the court place great stress upon the fact that the *termini* of the voyage was not proposed to be changed.

In this case, Washington, J., says, "the rule which we consider firmly established by a long and uniform course of decisions, is that if the ship sail from the port mentioned in the policy, with the intention to go to the port also described therein, a determination to call at an intermediate port to land a cargo, is not such a change of the voyage as to prevent the policy from attaching, but is merely a case of deviation."

In the same case, Patterson, J., says, "from a review of the cases, the principle is established that when the *termini* of the voyage are the same, an intention to touch at an intermediate port, though out of the direct course, does not constitute a different voyage. In the present case the *termini* are the same."

The case of *Kenly vs. Ryan*, 2 H. Blackstone, 343, often relied upon as an authority to sustain the application of the principle of intended deviation, in distinction from abandonment, will be found to rest upon the same ground. It was an insurance from Granada to Liverpool.

She sailed with a settled purpose to touch at Cork. Having been lost before she arrived at the point of deviation, it was only an intent to deviate.

The Court say, "where the *termini* of the intended voyage was really the same as those described in the policy, it was to be con-

sidered the same voyage, and a design to deviate, not effected, would not vitiate."

The case of *Stacker vs. Harris*, 3 Mass., seems to be a case having a direct bearing upon the question. We are considering, and particularly upon the point whether this doctrine of abandonment of a voyage can be applied to a case arising upon a purpose thus formed wholly after the commencement of the voyage insured, and upon a general policy authorizing sailing to and from various ports. The insurance was from Boston to the Canaries, and at and from thence to any ports in Spanish America, and at and from thence to her port of discharge in the United States. The voyage is duly commenced, the ship goes to the Canaries and from thence to Vera Cruz. During this period the policy was in full force, but at Vera Cruz she takes a cargo for the Havana, and on her passage to the Havana, but while on the track, common to her proper voyage to her port of discharge in the United States, and before any actual departure from that common track, she was captured and lost. This Court held that the original voyage had been abandoned, and the voyage from Vera Cruz was a distinct voyage, and the insurers not liable for the loss, although the same happened before the vessel came to the dividing point.

The case just cited would seem decisive of the case now before us. The rule on this subject, as stated in *Arnould on Insurance*, 1 Arn. 344 (350,) is that a change of voyage takes place when either before, or after sailing, the assured abandons the thought of proceeding to the port of destination originally prescribed by the policy, and seeks for another. "The effect of such a change of voyage is to discharge the underwriter from all liability in the policy from the moment the purpose of changing the voyage is distinctly formed."

"Hence if the purpose of changing the law be fixed before the commencement of the risk, the policy is void *ab initio*—if it be not formed until after the ship has sailed, the underwriter is discharged from all liability for losses which may occur subsequently to its having been formed, although such loss may take place while the ship is still on the track common both to the voyage insured and that which is substituted for it.

It is not necessary in sustaining the defence to the present action to sanction the broad doctrine thus stated by Arnould, and apparently sanctioned by Chancellor Kent and Justice Van Ness, that a change of purpose as to the port of destination, formed while actually on a voyage from the port described in the policy to the port described in the policy is, from the moment it is decided upon, to be dealt with as an abandonment of the voyage insured. This policy of insurance contemplated, in the first instance, a voyage to Akyab, for which a stipulated rate of premium was to be paid, and a further voyage from Akyab to the port of discharge in the kingdom of Great Britain, at another and different rate of premium—the first of these voyages was made under the terms of the policy. The second commenced at Akyab. Before leaving Akyab, or commencing the voyage, the master entered into a contract, the performance of which required him, as the events proved, to change his port of discharge to one out of the kingdom of Great Britain. It is true that when the ship sailed from Akyab, it was left uncertain where the port of discharge would be, but no right of choice on the part of the ship, but at the orders of the shipper, to be received at Falmouth. The stoppage was at Falmouth for such orders, and at Falmouth the shipper, as he was authorized by the contract at Akyab, selected Antwerp as the port of discharge for the cargo, and it is distinctly admitted “that in pursuance of those orders and the contract of affreightment, the ship sailed from Falmouth bound for Antwerp as her port of discharge. The ship pursued the voyage to Antwerp by the usual track for such a voyage, and while thus pursuing it, she accidentally went ashore in a fog, on the south side of the Isle of Wight, and was totally lost by the perils of the sea. The track of the voyage from Akyab to the time of the loss of ship, was one that might have been pursued without liability for deviation, had the master received orders at Falmouth to go to any port on the east coast of Great Britain, north of the Isle of Wight.

It would seem to present a decided case of substitution of a new voyage, and abandonment of that described in the policy. The purpose so to do was fully formed, and obligations assumed in reference to it, before commencing the voyage from Akyab, at the

election of the shipper. What was uncertain or fluctuating during the voyage to Falmouth was at that place made certain, and every other purpose was abandoned, and a voyage commenced from Falmouth to Antwerp, which was only defeated by the loss of the ship by the perils of the sea—that the loss occurred on a track of a voyage common to a port on the east coast of Great Britain, as well as Antwerp, does none the less make this a case of substitution of a new voyage. The termini were no longer the same. The voyage had lost its identity, and could in no sense be called a voyage to a port of discharge in the kingdom of Great Britain.

Upon the facts stated in this case, submitted to us, the Court are of opinion that the original voyage was abandoned at Falmouth, and that when the ship sailed from Falmouth bound to Antwerp as her port of discharge, she had commenced a new voyage, and not one covered by this policy.

Judgment for the Defendant.

The decision in the foregoing case, so far as it proceeds on the ground that the change of the *terminus* of a voyage, during its progress, is *ipso facto* an avoidance of the insurance, is in accordance with what is stated by Mr. Arnould, 1 Arn. on Ins. 343, &c., 2d ed., and no doubt correctly, to be the result of the latest English authorities, and has also in its favor in this country the great weight of Chancellor Kent's name, 14 Johns. 57. Yet it has against it the decision of the majority both of the Supreme Court and the Court of Appeals of New York, in *Lawrence vs. Ocean Ins. Co.*, 11 Johns. 241; 14 Johns. 46; of the dicta at least of Judge Johnson in *Marine Ins. Co.*, of *Alexandria vs. Tucker*, 8 Cranch, 357; and of the dicta if not the decision in *Winter vs. Delaware Mutual Safety Ins. Co.*, 30 Penn. St. 339. Mr. Phillips' opinion is also opposed to the English view, 1 Phill. on Ins. § 992. There being this conflict of authority on the

narrow but rather important question which is discussed in the text with so much acuteness and ability, it is perhaps just and proper to re-state briefly the arguments which have been supposed to justify the opposite conclusion.

The ordinary marine policy is an undertaking to indemnify the insured against certain kinds of losses which may happen to a ship or its cargo or freight, during the course of a particular voyage. This voyage is usually but not necessarily ascertained by reference to some designated *termini*. It may be, for instance, "from Boston to Liverpool," but it may be just as well "from the United States to Europe and a market." See *Gardner vs. Col. Ins. Co.*, 2 Cranch, 473; *Leathby vs. Hunter*, 7 Bing. 517; *Robertson vs. Money*, 1 Ry. & M. 75. It is all, so far, a mere matter of agreement between the parties. But a voyage, in contemplation of law, does not consist simply of a point of departure and a point of destination. If

it did, a vessel might carry its insurance round the globe, provided only the insured intended at some time or other to bring her into the designated port. It further includes and requires the strict pursuance of the usual course of navigation between the points specified in the policy, for a vessel of the kind. It would not be of much importance to an insurer, whether a ship from Boston went to Liverpool or to Southampton; but it would be whether she went to either, in winter time, by way of Greenland, instead of by the customary route. It is therefore settled, that if a vessel, without reason, departs or deviates from this usual course of navigation, it is as much a forfeiture of her insurance as if she changed her destination altogether. See 1 Phillips on Ins. § 989; 1 Arnould, 841. Why? Not indeed because the risk is increased, which perhaps could never be absolutely ascertained, but because the vessel is no longer on the *voyage* insured: 1 Phillips, § 988; 1 Arn. 842.

So far it seems impossible to distinguish between a change in the *terminus* of a voyage, and a change in the course of its navigation. According to circumstances, the one or the other would be most injurious. In either case it is an effectual change in the *voyage* itself, within the expressed or implied understanding of the parties, and the insurer is entitled to say, *non in hac fœdera veni*. Now, suppose during the voyage the insured entertains, and declares in the most emphatic and decisive way, a determination to deviate from the proper route at a particular point, say, to go to a port several hundred miles out of the usual course; but *before* that determination has been carried into effect, and the point of departure reached, a loss takes place. In such case, it is agreed on all hands, that the insurer is not dis-

charged. *Foster vs. Wilmer*, 2 Strange, 1249; *Carter vs. Royal Exch. Co.*, cited *Ibid.*; *Thellusson vs. Ferguson*, 1 Douglas, 861; *Hare vs. Travis*, 7 B. & Cr. 15; *Marine Ins. Co. vs. Tucker*, 8 Cranoh, 857; *Hobart vs. Norton*, 8 Pick. 159; *Winter vs. Delaware Mut. Safety Ins. Co.*, 80 Penn. St. 839; 1 Phillips, § 1001; 1 Arn. 845. A mere intention to do wrong, to violate the terms of a contract, is nothing. Before the wrongful act is committed, the man may change his mind; and he is not estopped from repentance by his declarations alone. Just so long as the vessel is kept on the proper track, it matters nothing to the insurer, what the secret or avowed designs of the insured may be.

Now, suppose in the case put, instead of its being a change of the *course* of a voyage, it is a change of its *terminus* which is resolved upon; what reason can be assigned for any difference in the result? To the insurer there can be practically none, for until the point of divergence is reached, there is no increase of risk; and after it is passed he gains equally in either case, for in both his liability is thereby cut short, and the premium prematurely earned. Nor, as we have suggested, is the change of the *terminus* of a voyage always or necessarily a more important thing than a change of route. The owner of a vessel insured from Liverpool to Albany may, for some reason, determine, in the course of the voyage, to make New York the port of discharge. Here the course of the voyage, so long as it lasts, is entirely unaffected, and though there is a change of the *terminus ad quem*, it is one which enures to the advantage of the insurer, by shortening the duration of the risk. Can it be that this would cause an absolute forfeiture of the insurance, while if the insured, instead of shortening his voyage, had lengthened it, by inserting

a parenthetical trip to Baltimore, he would be safe until he got off the Banks of Newfoundland? The answer to this is succinctly given by Chief Justice Lowrie, in *Winter vs. Ins. Co.*, 80 Penn. St. 339: "It is not essential to perform the whole voyage; the less of it the better for the insurer."

These considerations show that the distinction between a change of the terminus of a voyage and a change of its course, at least as respects this particular point, is entirely artificial, and founded in no obvious reason. And even if it could be sustained, it would be productive of more practical inconvenience than benefit. It would require in every case an investigation into the intentions and motives of the insured or his shipmaster, during the voyage, which would be difficult and often fruitless, for it would go hard, if he who must be best aware of those intentions and motives, could not discover, when the pinch came, that it was always his design to wind up the deviation, by however circuitous a

course, at the original port of destination. On the other hand, that by which alone the insurer can be really affected, an actual deviation from the proper course of the vessel, is a physical fact which can be ascertained with ease, and readily proved.

For reasons such as these, it is urged by Mr. Phillips and others, that the doctrine of *Lawrence vs. Ins. Co.*, above cited, from its greater simplicity, convenience, and good sense, is to be preferred to that of the English Courts on the subject. The arguments and authorities by which the latter is supported, are fully and carefully stated in the foregoing opinion of Mr. Justice Dewey, and we shall not attempt to weaken them by repetition. We may observe, in conclusion, that the actual decision in the case proceeds on a distinction which may be considered to reconcile the authorities to some degree, and which, at any rate, is ingenious, and forcibly sustained.

H. W.

In the Supreme Court of Errors of Connecticut—Sept. Term, 1860.

BOWMAN vs. FOOT.

Our statutes with regard to the recovery of leased premises, except in the specific remedy which they provide and the notice to quit prescribed, do not dispense with the requirements of the common law on the subject.

A lease for a term of years, under which the rent was payable quarterly on certain days named, contained the following condition:—"Provided however, that if the lessee shall neglect to pay the rent as aforesaid, then this lease shall thereupon, by virtue of this express stipulation, expire and terminate; and the lessor may, at any time thereafter, re-enter said premises, and the same possess as of his former estate." Held,

1. That the terms *expire and terminate* were merely equivalent to the more common expression, *shall become void*.

2. That the lease, by the non-payment of rent, did not become void, but only voidable at the option of the lessor.

3. That to take advantage of his right to avoid the lease, it was necessary for the lessor—1st. To make demand of the rent on the day it fell due, on the premises, and at a convenient hour before sunset. 2d. Upon neglect to pay the rent, to make a re-entry on the premises, or in some other positive manner assert the forfeiture of the lease. [Per STORRS, C. J., and HINMAN, J.; ELLSWORTH and SANFORD, Js., dissenting.]

Whether, after an entry for non-payment of rent, the acceptance of the rent is a waiver of the forfeiture: *Quers.* The current of authorities is against such a doctrine.

Writ of error from the judgment of a justice of the peace, upon a summary process brought by the present defendant for the recovery of certain premises leased to the present plaintiff. The writ of error was brought to the Superior Court, and by that Court reserved for the advice of this Court. By the bill of exceptions allowed by the justice, and upon which the only questions in the case arose, the following facts appeared.

The lease under which the defendant in the original suit held the premises, was (so far as important to the case) as follows:

“This indenture, made by and between Enos Foot of the first part, and William F. Bowman of the second part, witnesseth, that the said party of the first part has leased and does hereby lease to the said party of the second part, the house and premises known as the Assembly House, in the city of New Haven, on the corner of Court and Orange streets, for the term of three years from the first day of April, 1858, for the annual rent of five hundred and fifty dollars, payable in quarter-yearly payments of one hundred and thirty-seven $\frac{50}{100}$ dollars each, to wit: on the first days of July, October, January and April, in each year.

“And the said party of the first part covenants with said party of the second part, that he has good right to lease said premises in manner aforesaid, and that he will suffer and permit said party of the second part, (he keeping all the covenants on his part, as hereinafter contained,) to occupy, possess, and enjoy said premises during the term aforesaid, without hindrance or molestation from him or any person claiming by, from, or under him.

"And the said party of the second part covenants with the said party of the first part to hire said premises, and to pay the rent therefor, as aforesaid. * * * *

"*Provided however*, and it is further agreed, that if said party of the second part shall neglect to pay the rent as aforesaid. * * * then this lease shall thereupon, by virtue of this express stipulation therein, expire and terminate, and the party of the first part may, at any time thereafter, re-enter said premises, and the same have and possess as of his former estate.

"And it is further agreed between the parties hereto, that whenever this lease shall terminate, either by lapse of time or by virtue of any of the express stipulations therein, that said lessee hereby waives all right to any notice to quit possession, as prescribed by the statute relating to summary process. * * *

"And this agreement in writing is, at all times during the period the lessee shall occupy said premises, to be referred to as evidence of the conditions, stipulations, and agreements under which he occupies the same."

It was found by the court that there was due to the plaintiff from the defendant, as rent under the lease, on the first day of April, 1859, the sum of \$137.50, and that the defendant did not, in fact, pay this sum on that day. On this point the court found more particularly, that, on the first day of April the plaintiff had an interview with the defendant, in which the parties conversed about the rent and about the payment of a certain note for \$400, then due from the defendant to the plaintiff, and that the plaintiff did not then, in fact, waive the payment of the rent at that time, or excuse the defendant from the immediate payment thereof, but that the defendant understood the plaintiff in that conversation expressly to excuse him from such immediate payment, and to consent that he might pay the rent at a subsequent day; and the Court found that, in consequence of such understanding, the defendant omitted to pay the rent on that day. The Court further found that, on the 4th day of April, 1859, and before suit was brought, the defendant tendered to the plaintiff, as rent, the sum of \$150, and that the plaintiff accepted it as rent to April first, and gave a receipt therefor

on account, but that the plaintiff, in accepting it, did not expressly waive any right which he then had (if he then had any) to prosecute and maintain his suit, but, on the contrary, then expressly declared that he did not waive any such right.

The plaintiff claimed, upon the facts so found by the court, that the law was so that the defendant had, within the legal intent and meaning of the lease, "neglected" to pay the rent on the first day of April, and that, consequently, the lease did on the same day expire and terminate; but the defendant contended that upon the facts the law was so, that he did not, within such legal intent and meaning, "neglect" to pay the rent. Upon this question of law the court sustained the claim of the plaintiff, and held that, upon the facts so found, the defendant had "neglected" to pay the rent, and that consequently the lease did, on the 1st day of April, 1859, expire and terminate.

The plaintiff in error assigned as errors—1st. That the justice held that the right to insist on the forfeiture for non-payment of the rent due on the 1st of April, 1859, had not been waived by the subsequent acceptance of the rent on the 4th of April, 1859; and 2d. That the justice held that the lease was determined on the 1st of April, 1859, by the non-payment of the rent due on that day, when no demand had been made for the rent.

Doolittle and Bronson, for the plaintiff in error.

C. R. Ingersoll, for defendant.

The opinion of the Court was delivered by

STORRS, C. J.—We do not find it necessary to decide whether, by the acceptance of rent which fell due before the alleged determination of the lease, the lessor waived his right to repossess himself of his estate. The current of authority is against such a doctrine, although the opposite view of the law is not wholly unsupported. *Coon vs. Brickett*, 2 N. Hamp. 163. It is generally maintained that an entry for condition broken ought not at all to affect the right to receive payment of a pre-existing debt, or the acceptance of payment of such a debt to affect the right of entry.

Nor do we determine whether the effect of such an acceptance can be qualified by a landlord's declaration, at the time of the acceptance, that he does not thereby mean to waive any right. High authority sanctions the idea that the acceptance of rent accruing after condition broken, is in law a waiver of the forfeiture, and not evidence of such waiver merely. It has also been said by judges of great eminence, that the right of the party who pays money to control its application, constrains the lessor who receives rent, tendered as such, to waive his claim of forfeiture.

The only point which we propose to settle as the law of the present case, is that upon the facts stated there was no legal determination of the lessee's estate.

Our statute of summary process recognises no other termination of leases than such as is effected by force of the contract itself. It supersedes none of the common law remedies of the landlord, except in respect of the notice to quit and the form of procedure by action. It follows, that the question whether the tenant's rights have ceased must be settled according to a common law interpretation of the instrument of demise. In some States, precise legal consequences are annexed by statute to the non-payment of rent, and the lessee is arbitrarily divested of his estate. Our statutes contain no such provision.

The lease in evidence was for three years, ending on the first day of April, 1861. It contained a covenant of quiet enjoyment for the full term, with a qualification thus expressed:—"he [the lessee] keeping all the covenants on his part." One of these covenants was for the payment of a quarterly rent upon certain quarter days named. In a subsequent part of the instrument is a proviso of the following tenor: "Provided, however, that if the lessee neglects to pay the rent, &c., then this lease shall thereupon, by virtue of this express stipulation therein, expire and terminate, and the party of the first part may, at any time thereafter, re-enter said premises, and the same have and possess as of his former estate." Again, the parties agree that so long as the lessee's occupation continues, (referring to a holding over by consent,) the written agreement shall be evidence "of the *conditions*, stipulations and agreements under

which he occupies." It will be observed that the draughtsman of the contract designs to make use of technical language; and we have, in the first place, the clearest expression of a *condition* annexed to the covenant for the tenant's peaceable enjoyment of estate. Next, we have the correct commencement of a condition—"provided however"—in the very stipulation which is said to terminate the lease, and we have, at the close of the stipulation, a re-entry clause—the apt formula to indicate how a forfeiture is to be enforced: Best, C. J., in *Willson vs. Phillips*, 2 Bing. 13. Last of all, we have an explicit reference to the "conditions" of the instrument by that very name. It was the clear intent of the parties, whatever they may have supposed to be the legal consequences in detail of such a stipulation, to attach to the demise a condition for the lessor's benefit, upon the breach of which he was authorized to compel the tenant to submit to a forfeiture of his tenancy.

The legal interpretation of the instrument agrees with this manifest intent. There is no peculiar significance to the words "shall expire and terminate." They mean just as much, and just as little, as would the more common phrase, "shall become void," if inserted at the same place. Indeed, it appears that both terms were employed together in a lease, the construction of which was the subject of determination in the case of *Jackson vs. Harrison*, 17 Johns. 66. It was there provided, that in case the rent should not be paid "it should be lawful for the lessor to re-enter," &c., and that "the lease and estate thereby granted should cease, determine, and become utterly void, if the lessor should elect so to consider it." It is well understood, that such expressions as these in leases for years do not designate the non-payment of rent as an event, like a death or a marriage, at the date of which an estate shall cease at all events. If so, it would be in the power of the tenant, whenever his leasehold property became unprofitable or onerous, to relieve himself at any pay-day of his duty to retain it, by simply violating his own covenants. Such a construction would be a plain perversion of the intent of the parties. Accordingly, such stipulations are now universally taken to be for the advantage of the landlord.

"Void" means "voidable at his election:" *Jones vs. Carter*, 1b Mees. & Wels. 718. "Expire and terminate" is also an elliptical phrase, meaning "expire and terminate at the lessor's option." This principle of construction leaves us nothing to do with a distinction, which is said to prevail between freehold interests and leases for years, requiring in one case, and not requiring in the other, an entry or claim to divest an estate wholly void by the breach of a condition. In cases like the present, the estate is not wholly void by reason of a breach. Its avoidance is contingent upon the acts of the reversioner. Compare *Shep. Touch.*, pages 139 and 184; see, also, *Doe vs. Bancks*, 4 B. & Ald. 401. To ascertain the law of the case in hand we must fill up the ellipsis. The lease is to expire and terminate after non-payment, at the option of the lessor, who may then re-enter and annul the tenancy.

This rendering of the contract makes the duration of the lease contingent on the exercise by the lessor of his right to terminate it. To denote how this is to be done, the instrument, fairly read, implies that a re-entry shall take place; the usual technical mode prescribed in such contracts, indicating, in the case of estates less than freehold, not necessarily a literal entry, but some proceeding that should in a significant and decisive manner declare the forfeiture of the lease and assert the landlord's rights.

If a tenant's right is thus voidable only, the option to avoid must be exercised under the contract and according to legal usage. The re-entry clause, at all events, creates a necessity for some positive act of the landlord, to determine his tenant's estate. In construing a lease which authorized the lessor, upon the lessee's neglect to perform his covenants, to enter without further demand and notice, and to dispossess the latter, the Supreme Court of Massachusetts held that, inasmuch as a condition and not a limitation was created by the words employed, the estate of the tenant was not avoided by the neglect, and could only be terminated by re-entry: *Fifty Associates vs. Howland*, 11 Met. 99. Since the present case was decided, we have learned that this doctrine was involved in a decision of the Queen's Bench, *Bishop vs. Trustees of Bedford Charity*, 28 L. Jour. 215, which was afterwards reviewed in the Exchequer

Chamber. The doctrine itself does not appear to have been disputed. The defendants, owners of certain premises, were charged with being also in possession of them, and therefore liable for an injury suffered through their negligent condition. They had been leased for thirty years, subject to a right of re-entry for the non-payment of rent. The lessee failed to pay, went into bankruptcy, and left the occupancy of the premises to his weekly lodgers, who, as such, had of course no estate in them. From these persons the defendants, before the accident, had collected rent, and after it, by a decree of the Court of Insolvency, obtained a surrender of the lease itself. To establish possession in the defendants, the judges of the Exchequer Chamber held that it must appear that they had by re-entry avoided their tenant's lease; that the receipt of rent from the weekly lodgers was no proof of re-entry, as it was consistent with the continued existence of the lessee's tenancy; and that, as no demand was proved, the defendants had not asserted in fact their rights under the re-entry clause, and therefore could not be said to be in possession of their property at the time of the injury.

Where a lease is thus voidable, the landlord's option to avoid it should be exercised at the proper point of time, and in the proper place; and, above all, should be brought home to the tenant's knowledge through some unequivocal act, in order to certify to him that he is absolved from the further performance of a lessee's duties. "Where," to quote Baron Parke, "the terms of a lease provide that it shall be avoided by re-entry, either in the case of a freehold lease or a *chattel interest*, an entry, or what is tantamount thereto, is indispensable."

Assuming, then, that it devolves on the lessor to take active measures to enforce his right of avoidance, we cannot doubt that no such forfeiture should be suffered, as for a breach of duty, unless the performance of the duty is first demanded or requested. This principle is illustrated in a striking manner by the case of *Merrifield vs. Cobleigh*, 4 Cush. 182, where the controversy related to a freehold estate. "Whenever," so ran the covenant, "the grantee shall neglect or refuse to support" a certain fence, "this

deed shall be void." The court held that, until there was a demand upon the grantee to repair the decayed fence, there was no breach of the condition. Yet literally, at the point of time when the grantee passively neglected that duty, his title failed. In the case before us no demand was made for the rent. The conversation of April 1st, 1859, however it was or ought to have been understood, is not claimed to have amounted, even by implication, to such a demand.

To prevent future litigation, and to enable parties to make contracts adapted to the view which we take of the law, we go a step beyond the requirements of the case to speak of the formalities necessary to terminate a lease voidable on the non-payment of rent. We confess that we know of no new rules with which to instruct our judgment in this matter, and naturally adhere to the settled doctrines of the common law.

The case of *Jackson vs. Harrison* was decided by a learned court, and has not been overruled by any of the higher tribunals of the State of New York. The lease in question was for seven years, and provided, as has been stated, for an avoidance and re-entry upon non-payment of rent. The court held that an entry was essential to the forfeiture claimed, and that none could be made without showing a demand of the rent due, upon the last day of payment, on the premises, and at a convenient hour before sunset. "The plaintiff," says Van Ness, J., "equally fails in showing a right of entry, by reason that the defendant did not pay the United States tax, because the indispensably necessary step of making a demand of the defendant within the period required by law in order to create a forfeiture, was not taken." This decision seems to be a true exposition of the common law.

A late New Hampshire case, *McQuesten vs. Morgan*, 34 N. Hamp. 400, in its result, accords with our present conclusion, and involves facts of the same general character.

There is error in the proceedings of the magistrate, and we advise that his judgment be reversed.

In this opinion HINMAN, J., concurred.

ELLSWORTH and SANFORD, Js., were of opinion that our statutes respecting leases had done away with the technical rules of the common law as to getting possession of leased premises, and dissented from the opinion of the Chief Justice.

Judgment reversed.

(1) It has been in general held that the receipt of rent accruing after a breach of covenant by a tenant, which by the provisions of his lease creates a forfeiture of the term, is a waiver by the landlord of his right of re-entry, if he was at the time aware of the forfeiture, but otherwise not, because the act is an affirmance of the existence of the tenancy, and an election by the landlord to treat the lease as still subsisting. *Jackson vs. Brownson*, 7 Johnson, 227; *Camp vs. Pulver*, 5 Barbour, 91; *Clarke vs. Cummings*, Id. 339; *Koeler vs. Davis*, 5 Duer, 507; *Jackson vs. Sheldon*, 5 Cowen, 448; *McKeldore vs. Darracott*, 18 Gratt. 278; *Dendy vs. Nicholl*, 4 C. B., N. S. 376; *Price vs. Werwood*, 4 Hurls. & Norm. 511. In *Croft vs. Lumley*, 5 Ell. & Bl. 648; 6 H. Lds. Cases, 672; Ell., Bl. & Ell. 1069, Am. ed., the question was much discussed. There a lessee tendered rent which had accrued subsequently to breaches of covenant, as rent, but the lessor took it as compensation for occupation, expressly reserving the right of re-entry; it was held by the Queen's Bench to be nevertheless a waiver of the forfeiture. The judgment was affirmed in the Exchequer Chamber, and in the House of Lords on another ground. But in the latter tribunal it was held by a majority of the Judges consulted, Crompton, J., dissenting, that by force of the maxim *solutio accipitur in modum solventis*, the receipt of the rent operated as a waiver of the forfeiture in respect to such breaches as were known at the time. Erle, J., went farther, and held it to be a waiver also as respects even unknown

breaches, which did not differ in circumstances from those which were known; and Watson, B., held it to be a waiver of all previous breaches. On the other hand, it was the opinion of Crompton, J., that the receipt of the rent was not necessarily a waiver, but that the question was, whether it was in fact received with the intention to waive the forfeiture, and in this Lord Wensleydale appeared to agree.

For the converse reason, the mere receipt of rent due *before* the forfeiture, will not be a waiver. *Jackson vs. Allen*, 8 Cow. 220; *Hunter vs. Ousterhoudt*, 11 Barbour, 38; *Stuyvesant vs. Davis*, 9 Paige, 427; *Bleeker vs. Smith*, 13 Wend. 538; though the opposite was held in *Coon vs. Bricket*, 2 New Hamp. 168. Nor even if after a forfeiture will it operate to relieve from the consequences of subsequent continuance of the original forfeiture. *Jackson vs. Allen*, 8 Cowen, 220; *Bleeker vs. Smith*, 13 Wend. 538. But where the landlord *distraints* for rent due *before* the forfeiture, with the knowledge of it, it will be a waiver; because that is an act which could only be lawfully done during the continuance of the tenancy. *Jackson vs. Sheldon*, 5 Bowen, 448; *Stuyvesant vs. Davis*, 9 Paige, 427; but see *McKeldore vs. Darracott*, 18 Grattan, 278. On the other hand, after the landlord has taken steps by ejectment to enforce his right of entry, he cannot obtain any relief in equity or at law, which would assume the existence of the tenancy, as by an injunction to prevent the collection of rent by the tenant from sub-tenants; *Stuyvesant vs. Davis*, 9

Paige, 427; or an action to compel the payment of subsequent rent or the performance of the covenants of the lease. *Jones vs. Carter*, 15 M. & W. 718.

(2) There is no doubt, as is stated in the foregoing opinion, that weight of authority is that, under the usual clause of forfeiture, the breach of a condition in a lease does not make it absolutely void, but only voidable at the election of the landlord; and that re-entry, or what is equivalent thereto, must be resorted to by him, to enforce the election. In addition to the cases cited in the foregoing opinion, *Doe vs. Banks*, 4 B. & A. 401; *Rede vs. Farr*, 6 M. & S. 121; *Doe vs. Meux*, 4 B. & C. 606; *Doe vs. Birch*, 1 M. & W. 406; *Doe vs. Lewis*, 5 A. & E. 277; *Clarke vs. Jones*, 1 Denio, 577; *Phillips vs. Chesson*, 12 Ired. 194. But in Pennsylvania, this appears not to be the law; and the breach of condition is held to avoid the lease absolutely: *Kenrick vs. Smith*, 7 Watts & Serg. 47; *Shaeffer vs. Shaeffer*, 1 Wright, 527; *Davis vs. Moss*, 2 Id. 846. But it deserves notice, that the question did not distinctly arise in either of these cases. The first was substantially that of a vendee under articles, so that the landlord had still the legal title. In the second he had present possession for a limited estate; and the third was that of a mining lease, in which the landlord

had a general possession of the land subject to the mining right.

(3) The established rule at common law has always been, that where a right of re-entry is claimed on the ground of a forfeiture for non-payment of rent, there must be proof of a demand of the precise sum due, on the most notorious part of the demised premises, at a convenient time before sunset on the day when the rent is due. *Co. Litt.* 202 a; 1 *Williams & Saunders*, 287; *Clun's Case*, 10 Rep. 129 a; *Cropp vs. Hambleton, Co.*, Elix. 48; *Wood & Chevor's Case*, 4 Leonard, 180; *Tinkler vs. Prentice*, 4 Taunt. 549; *Acocks vs. Phillips*, 5 Hurlst. & Norm. 188; and this has been generally followed in the United States. *Conner vs. Bradley*, 1 How. U. S. 217; 17 *Pet.* 267; *Jackson vs. Harrison*, 17 Johns. 70; *Remsen vs. Concklin*, 18 Id. 450; *Jackson vs. Kepp*, 3 Wend. 230; *Van Rensselaer vs. Jewell*, 2 Comst. 147; *McCormick vs. Connell*, 6 Serg. & B. 153; *Stover vs. Whitman*, 6 Binn. 419; *Gage vs. Smith*, 14 Maine, 466; *James vs. Reed*, 15 New Hamp. 68; *Jewett vs. Berry*, 20 Id. 46; *McQuester vs. Mergher*, 34 Id. 400; *Chapman vs. Wright*, 20 Illinois, 120; *Eichart vs. Bargas*, 12 B. Monroe, 464; *Mackuben vs. Whitecraft*, 4 Harr. & John. 185; *Yale vs. Crewson*, 6 Ind. 65; *Phillips vs. Doe*, 8 Ind. 132; *Gaskill vs. Tramer*, 3 Calif. 334.

H. W.

In the New York Court of Appeals.

CHESTER M. FOSTER ET AL. vs. DENIS JULIEN, APPELLANT.¹

1. A. made his promissory note in the city of New York, payable generally. He resided at the time in New York, as well as the endorser. Before the note fell due, he removed to New Jersey, where he resided at its maturity. *Held*, that it was not necessary for the holder, in order to charge the endorser, to present the note for payment at the maker's former place of residence in New York.

¹ We are indebted to the courtesy of Judge Davies for the following opinion, for which he will accept our thanks.—Eds. A. L. REG.

2. The cases of *Anderson vs. Drake*, 14 Johnson, 114, and *Taylor vs. Snyder*, 8 Denio, 145, commented upon, and the case of *Wheeler vs. Field*, 6 Metcalf, 290, overruled.

The opinion of the Court was delivered by

DAVIES, J.—This is an action upon a promissory note, made by one George Varden, payable to the order of the defendant, and by him indorsed. The note was dated at New York, where the maker resided at the time, and the indorser resided in the same city. The note was dated May 3d, 1855, and had three months to run. About the middle of June following, the maker removed to the State of New Jersey, and continued to reside there until Sept. 24, 1855. The note fell due August 6th, and was protested, and notice of protest duly given to the defendant. From the facts found, it appears that the notary, on the day the note fell due, made inquiries for the maker at the Post Office in the City of New York, and, to ascertain his residence, examined the City Directory, but the maker's residence, on such inquiry, could not be found. The Judge, upon those facts, found, as a question of law, that the removal of the maker from the State of New York into the State of New Jersey, and his continued residence there up to the maturity of the note, dispensed with the necessity of the demand upon him. The judgment was affirmed at the General Term, and the defendant appeals to this Court.

The only question presented for consideration is, whether the change of residence of the maker, from the State of New York to the State of New Jersey, intermediate the date of the note and its maturity, dispensed with the necessity of presenting the note at the last place of residence of the maker in this State, and demanding payment thereof there. It is not contended that the holder was bound to seek out the maker or his place of residence in the State to which he had removed, for the purpose of presenting the note and demanding payment. But it is urged that the holder should have sought the last place of residence of the maker in this State, and made the presentation and demand there. The Supreme Court of this State in *Anderson vs. Drake*, 14 Johns. 114, say they had then (in 1817,) in a late case not reported, decided, when the

drawer of a note had removed to Canada, the note being dated and drawn in Albany, though not made payable at any particular place in that city, that a demand in Albany was sufficient to charge the indorser. It is not stated where the demand in that case was made in Albany, and it is not seen, upon the facts stated, how it could have been made, nor is any reason given for making it. It was decided in *Anderson vs. Drake, supra*, that when a note is not made payable at any particular place, and the maker has a known and permanent residence *within the State*, the holder is bound to make a demand at such residence in order to charge the indorser. The general rule is, that the holder of a note who seeks to charge the indorser, must demand payment of the note, at its maturity, of the maker, at his place of business or residence. If the note is payable at a particular place, the demand must be made at the appointed place. The holder must use all reasonable and proper diligence to find the maker, when no particular place of payment is appointed in the note. And the case of *Anderson vs. Drake, supra*, established the rule, that when a change of residence of the maker took place between the making of the note and its maturity, and no place was appointed in the note for its payment, the demand of payment must be made of the maker at his place of residence at the maturity of the note, provided such residence was within this State. *Taylor vs. Snyder*, 3 Denio, 145, was an action upon a note dated at Troy, in this State, the maker residing in Florida at the time of making the note, and at its maturity. No intermediate change of residence took place. The payment of the note was demanded of the defendant, the indorser thereon, at Troy, and on refusal, was protested, and notice given. Beardsley, J., reviews, ably and elaborately, all the cases where the presentment of the note for payment has been excused, and classifies the exceptions to the general rule, requiring presentment and demand to charge the indorser, and shows they all rest on peculiar reasons. He says: "In one, the maker has absconded; in another, he is temporarily absent, and has no domicil or place of business within the State; in a third, his residence, if any, cannot be ascertained; while in the fourth, he has removed out of the State, and taken up his residence in another

country. In each of these instances, let it be observed, the fact constituting the excuse occurs subsequently to the making and indorsement of the note, and it is this new and changed condition of the maker, and that only, by which the indorser stands committed without a regular demand."

In *McGurdee vs. Bank of Washington*, 9 Wheaton, 598, the Supreme Court of the United States say, in reference to change of residence to a foreign country, or to another State, "that reason and convenience are in favor of sustaining the doctrine that such a removal is an excuse from actual demand. Precision and certainty are often of more importance to the rules of law than their abstract justice; on this point there is no other rule that can be laid down which will not have too much latitude as to place and distance. Besides which, it is consistent with analogy to other cases, that the indorser should stand committed in this respect by the conduct of the maker. For his absconding, or removal out of the kingdom, the indorser is held, in England, to stand committed."

It is thus seen that the controlling element, which is introduced to establish the indorser's liability, is the change of condition after the making of the note. It is this change which commits the indorser, and excuses the presentment and demand of the note; and in this State the rule has been regarded as well settled, since the decision of the case of *Anderson vs. Drake*, that a removal of the maker after the making of the note and before its maturity, out of the State, excuses the holder from presentment and demand. It is true that the court say that in the case of the removal of the maker of the note to Canada, intermediate its making and maturity, where the note was dated at Albany, a demand in Albany was held sufficient to charge the indorser, yet it is not stated where the demand in Albany in that case was made, or if the court deemed the fact of a demand essential. The principle of the cases was, that the removal of the maker excused presentment and demand, and the Canada case was decided in harmony with that principle, and it was not necessary to the case, or to render the decision in conformity with the previous cases, to advert to the fact that a demand of payment of the note (if any was made) was made in Albany. It

was not relied on, or adverted to, that such demand was made at any particular place, and no reason is suggested why it should have been made at all, or that its being made was regarded as a material circumstance. The Canada case is certainly no authority for the position of the defendant, that the demand should have been made at the last place of business or residence of the maker in this State. Beardsley, J., in *Taylor vs. Snyder, supra*, says, "that there is a further exception to the rule requiring a demand to be made of the maker, or at his domicil, or his place of business, for where a note is made by a resident of the State, who, before it is payable, removes from the State and takes up a permanent residence elsewhere, the holder need not follow him to make demand, but it is sufficient to present the note for payment at the former place of residence of the maker."

I have looked at all the authorities referred to in support of this position, and they fail entirely to sustain the point in terms stated, and furnish no authority for the qualification that it is sufficient to present the note for payment at the former place of business of the maker. The learned judge was misled by the head-note to the case in 9th Wheaton, *supra*, which is in these words: "When the maker of the note has removed into another State or another jurisdiction, subsequent to the making of the note, a personal demand on him is not necessary to charge the indorser; but it is sufficient to present the note at the former place of residence of the maker."

There is nothing in the case to warrant the qualifications or suggestions in the head-note relative to presenting the note at the former place of residence of the maker. It has long been well settled that a personal presentment of the note to the maker is not necessary to charge the indorser, neither will the presentment alone of the note suffice to charge the indorser; there must be a demand of payment, and refusal; but no case which I have met with requires that the presentment and demand should be personal to and of the maker. A demand of payment at the place of business, or residence of the maker, was sufficient, and a refusal by any one there was all that was required. In *Cromwell vs. Hyuson*, 2 Esp. 511, it was held that the presentation of a bill to the wife, at the party's

house, he being a master of a ship, and absent from England, was a sufficient demand. (See, also, 2 Taunton, 206.) The facts as admitted in *M'Gruder vs. Bank of Washington, supra*, were that at the maturity of the note neither the holder or the notary knew of the removal, from the District of Columbia, of the maker who resided there at the date of the note; that ten days before its maturity he removed out of the District to the State of Maryland, nine miles distance from his previous residence. At its maturity the note was delivered to a notary, who went with it to the house of the maker, where he had resided, and from which he had removed, in order there to present the note and demand payment; and not finding him there, and being ignorant of his place of residence, returned the said note under protest. Now, it is not alleged that the notary presented the note at the last place of residence of the maker, in the District, or that he demanded payment of it from any body, and the court, in its opinion, does not advert to the fact that the notary went with the note to the maker's last place of residence, or intimate that he should have done so, and there presented it and demanded payment; but the court distinctly places its decision upon the fact that the removal of the maker, after the date of the note, and before its maturity, out of the District into one of the States, being in another jurisdiction, absolved the holder from the necessity of presentation and demand of payment, and held the indorser duly charged, though neither was done. The court gave no intimation that the note had been presented at the maker's last place of residence, or that that fact was regarded as at all material.

The next case referred to by Justice Beardsley is that of *Anderson vs. Drake, supra*, in which no such point arose or is referred to. The only allusion to it is the remark made relative to the Canada case, where it was said it was held that a demand in Albany was sufficient to charge the indorser. *Dennis vs. Walker, N. Hamp. 199*, did not present the point; but so far as it bears on the present case, is an authority to sustain the judgment in this case. There the maker of a note resided in Portsmouth, at the date of the note, but at its maturity was at sea, his family still residing there, and there had been no change of his residence. The court held that

his absence did not excuse presentment and demand at his residence to charge the indorser. Upham, J., says: "A removal without the bounds of the government, after the making of a note and before it becomes due, and where no place of payment of the note is specified, render a demand upon the maker unnecessary; but this is an exception to the general rule, and must be construed strictly. Anything less than an actual change of residence by removal without the State, would leave the rule too uncertain."

The next case is that of *Gillespie vs. Hannahan*, 4 M'Cord, Rep. 503. Here the notary made inquiry for the maker of the note in Charleston, where it was dated, and where the maker resided at the time it was made, but who had no residence at its maturity in Charleston, having in the meanwhile removed to Philadelphia. The notary protested the note, and gave notice to the indorser without having made any presentment or demand. In an action against the indorser, the court held that when the maker has removed to another State, and resided there at the maturity of the note, demand of payment was not necessary. The court says: "For all legal purposes a neighboring State is regarded as a foreign country. Bills drawn on a sister State are regarded as foreign bills, and the terms 'beyond the seas,' used in the statute of limitations, have in construction, been applied to a neighboring State, and I come to the conclusion that, for the purposes of a demand on the maker of a promissory note, it must be so regarded, and that his absence from the State in which the note was made, and where it was understood it was to be paid, will excuse the holder from making personal demand, in order to charge the indorser."

Reid vs. Morrison, 2 Watts & Sergt. 401, I regard as an authority in point. There the court held, that if the drawer of a bill or maker of a note has absconded, that circumstance will dispense with the necessity of making any further inquiry after him, citing *Chitt on Bills*, 261; *Bayley on Bills*, 95. In *Duncan vs. M'Cullough*, 4 Sergt. & Rawle, 480, the court say, "the same rule which exists in the case of absconding applies to that of the removal of the maker or drawer into another jurisdiction after the execution of the instrument." *Gist vs. Lybrand*, 3 Ohio, 305.

is also a case in point. It was urged there that no inquiry was made at the last place of residence of the maker for payment, he having intermediate the date of the note and its maturity, removed from the State. The court say, "we all concur in opinion with the Supreme Court of the United States upon the first point in this case. In the case of *McGruder vs. Bank of Washington*, cited by the plaintiff's counsel, they have settled that the removal of a maker of a note, after it was made and before its maturity, into a different State from where he resided when the note was made, excuses the holder from making actual demand of payment from the maker. Whether the demand should be made at any other place is not made a point or adjudicated upon in that case. But it seems to us a clear consequence of the decision that such demand was unnecessary. The fact of removal commits the indorser and dispenses with the demand, unless a particular place be appointed for the payment of the note in the note itself."

I entirely concur in the views thus clearly expressed by the Supreme Court of Ohio. I think they correctly apprehended the exact force and extent of the decision of the Supreme Court of the United States, and that case should be followed as an authority. There would have been no misapprehension in reference to that case, if the head-note of the reporter had not interpolated a qualification to the rule enunciated, not contained in the case or in the opinion of the court. This misapprehension undoubtedly led Mr. Justice Beardsley into the qualification of the rule otherwise correctly enunciated by him, and which rule was fully sustained by the authorities cited; but they do not sustain the qualification of the rule, it being only found in this head-note. The case in 9th Wheaton was decided in 1824, and I think the rule then laid down was in harmony with previous adjudications in England and in this country, and, as it establishes a uniform and reasonable and certain rule of commercial law by the highest tribunal in the country, and one not in conflict with our own decisions, I think we ought to recognise and adhere to it. This rule is approved by one of our most learned and able writers on this subject. See *Edwards on Bills*, pp. 485, 486.

I have been able to find but one case where a different rule has

been announced. It is that of *Wheeler vs. Field*, 6 Met. 290. There the court held, to charge an indorser upon a note dated in New York, where the maker had removed out of the State where it was made and dated before its maturity, that a demand should have been made at the maker's last place of residence in New York, when he had removed to the State of Illinois. No authorities are cited for the opinion expressed, and no reasons are given why it should be recognised. It is certainly in direct conflict with those which have been already referred to, and is not in harmony with the principles settled in numerous cases. We think it better to adhere to the long-settled rule as laid down in the case in 9th Wheaton, even although cases might be supposed in which its application might, by possibility, work some wrong. It is of the highest importance in a commercial community, that the rules relating to the presentment, demand, and protest of bills and notes, should be certain, and when once enunciated should be adhered to; and no reasons are suggested which we think should influence us to depart from or modify the rule as laid down by the United States Supreme Court in the case in 9th Wheaton. We think it a reasonable, just, and proper rule, and one which should have universal application.

The judgment appealed from should be affirmed, with costs.

It is much to be regretted that the rule applicable to an important point of mercantile law should be different in two States of such commercial importance as New York and Massachusetts. The opinion in the principal case shows that the weight of authority is in favor of the New York rule. The question may also be examined from another point of view.

A test by which the liability of an indorser may be ascertained, is the application of legal principles belonging to conditional contracts. Certain acts in the nature of conditions precedent, must be performed by the holder before the indorser can be regarded as liable. These conditions may be either express or implied. The general principles are the same.

I. Express conditions. The most common express condition arises when the note is made payable at a particular place. In England, it is the rule that such a condition forms part of the contract both with the maker and indorser, and no action can be brought against either, unless the condition is performed or dispensed with. In this country generally, the engagement of the maker under such circumstances is not conditional but absolute, and the failure of the holder to make the presentment can only be urged as matter of defence. The indorser may however insist that the clause forms an essential part of his contract, and that a demand should be made at the place named, in order that he may be charged. It is evident that the material point in this condition is *locality*

It is unimportant where the maker may reside. The parties have chosen by an explicit statement to contract, that though the maker may remove from the country or may abscond, the demand must be made at the place specified. It was upon this ground that *Sands vs. Clark*, 8 C. B. 751, was decided. An action was brought against the maker of a note payable at a particular place. No presentment had been made, and the excuse was offered that the maker had absconded. But as *locality* was the substance of the condition, the court held that it had not been performed, and the maker was not liable. The case was argued both by counsel and the court upon the law of conditions, and upon commercial decisions. *Maine's case*, 5 Coke R. 25 a, among others was cited. It was evidently the opinion of the court that the condition precedent in the case of negotiable paper would be dispensed with under the same circumstances as in other branches of the law. What would constitute a dispensation as to the maker would also as to the indorser. This was suggested by counsel, and denied by no one. It is evident, under the English law, the condition so far as it is expressed is the same in both cases.

II. It is true that there is a difference in one respect between express and implied conditions. The latter cannot affect the contract of the maker, but only of the endorser. In the absence of an express condition, the engagement of the maker is absolute. There is an entire accord between the commercial law of England and of this country in this respect. Implied conditions must, however, when they exist, be observed with the same accuracy as express conditions and parol evidence can no more vary one than the other. *Suse vs. Powell*, C. B. N. S. 537, (1860), Byles, delivering the opinion of the court.

What then are the circumstances under which the condition in question in the law of negotiable paper is waived? The indorser stipulates that certain acts in reference to the maker shall be done by the holder before he is liable, but he engages on his part that the maker shall remain in a condition to have those acts done. If the entire contract were written, it would be somewhat as follows: "it is understood that if the holder of the note shall, upon the day on which by the rules of commercial law it falls due, present it at the place of business or of the residence of the maker for payment, and if this is refused, shall give timely notice to the endorser, he will be liable. The endorser on his part agrees that the maker shall do no act to prevent the demand from being made in the manner agreed upon." This is the fair and reasonable construction of the contract. It is manifestly the engagement by the English law when the maker expressly stipulates for demand at a particular place, and no suggestion has ever been made in the English courts that the indorser's contract is in that case different from the maker's upon the subject of demand. There is, of course, no legal rule which would prevent the indorser from entering into an undertaking as to the conduct of the maker.

The circumstances dispensing with the performance of a condition precedent are thus stated by Addison. "Whenever a party by doing a previous act would acquire a right to any debt or duty, and the other prevents him from doing it, he acquires the right as completely as if it had been actually done,"

889, and cases cited. The only inquiry then is, has the maker prevented the holder from performing the condition or not? This is, for the purpose of the law, the indorser that the note shall be paid of the maker at his place.

of business or residence. It is clear that the condition is not that the demand shall be made of the maker personally, nor at any mere *locality*, but at that place where the additional fact appears, that it is the maker's place of business or his residence. *Chitty on Bills*, 412; *Byles on Bills*, 157. It has been held that a personal demand upon the acceptor of a bill at some other place is not sufficient. *King vs. Holmes*, 11 Penna. St. 465. The element of residence is so important, that if the maker of a note payable generally happen to be out of the country of his residence when the note is made, and return before it is due, the demand must still be made at his residence. *Spies vs. Gilmore*, 1 Coms. 821. So if the maker

removes after the note is made to another place within the State, demand must be made at the new residence. Demand at the *residence* is then the substantial part of the condition. If the maker removes from his residence to another State or country between the time of making the note and the day it falls due, he *prevents* the holder from fulfilling the condition. There is no necessity to present the note at the *former* residence. This would be substituting a different condition; that of *locality* instead of *residence*. It is well settled that the holder need not follow the maker out of the State to his new residence.

The result is, that the condition is entirely waived.

T. W. D.

ABSTRACTS OF RECENT ENGLISH DECISIONS.

HOUSE OF LORDS.

Joint-Stock Company—Transfer of Shares—Forged Transfer—Liability of Company to re-transfer—Suit in Equity—Action at Law.—T. and B. were in partnership, and took shares in the Midland Railway Company, as partnership property. B. forged T.'s name to a deed of transfer of the shares, purporting to be from T. and B. to L. for a nominal consideration. The company acted on this deed, and entered the name of L. as proprietor, and paid the dividends to B. for L., but B. appropriated the same, T. having died before B. *Held*, the administrator of T. had a right of suit in equity against the company, to replace the stock, and pay over the dividends which had been fraudulently obtained by B.; and it made no difference that there was no person capable of bringing an action at law: *Midland Railway Company vs. Taylor*.¹

Legacy—Vesting—Gift to a Class and Survivors—Meaning of word "Vest"—General Rules of Construction.—Where a testator gives a life-estate in his funds, and at the expiration thereof gives the principal to be

¹ 6 L. T., N. S. 78.

divided among several, and if any die then to the survivors, without specifying the time of survivorship, he is held to mean the contingency to extend over the whole period which elapses before the time of distribution or expiration of the life-estate, unless the context points out another time; in other words, the legacy does not vest till the death of the tenant for life: *Richardson vs. Robertson*.¹

Therefore where A., by will, gave a life-estate to B., and at B.'s death to six persons equally, declaring that "if any die without issue before his share vests, the same shall belong equally to the survivors," there was nothing in the word "vest" to prevent the application of the above rule: *Id.*

The word "vest" means *prima facie*, "come into possession," and not "accrue in point of interest:" *Id.*

Joint-Stock Company—Fraud—Misrepresentations by Secretary and Directors—How far Binding on Company.—A court of equity will not relieve on a general charge of fraud, but it must be alleged in what the fraud consists, and how it has been effected: *New Brunswick, &c., Railway Company vs. Conybeare*.²

If reports are made to the shareholders of a joint-stock company by the directors, and adopted at one of the meetings of the company, and afterwards industriously circulated, the representations in those reports become, after this adoption, those of the company, and therefore binding on the company. And if those reports so circulated, can be shown to be proximate and immediate cause of the shares being bought by individuals, the company cannot retain the benefit of the contract and keep the purchase-money which has been paid: *Id.*

If an incorporated company, acting by its agent, induces a person to enter into a contract for the benefit of the company, that company can no more repudiate the fraudulent agent than an individual could repudiate him, and the company are bound by the misrepresentations of their agent. But the principle cannot be carried so far that an action can be brought against the company on the ground of deceit, because the directors have done an act which might render them liable to such an action (per Lord Cranworth): *Id.*

¹ 6 L. T., N. S. 75.

² 6 L. T., N. S. 109.

COURT OF APPEAL, CHANCERY.

Injunction—Mining Lease—Demise of License to make Roads, &c.—Covenant to yield up Roads, &c.—Execution-Creditor of Lessee—His Right to seize Iron Plates and Sleepers.—In a lease of mines the plaintiff demised to K. full and free liberty and license to make and use such roads and ways upon the premises as should be “necessary or expedient for carrying and conveying” the minerals, and for “the commodious carrying on of the business of an iron-master.” There was then a covenant by the lessee, at the determination of the lease, to yield up such roads and ways in such good repair, &c., as that the works might be carried on by the lessor, his heirs and assigns.

Upon the works were two tram-roads, the plates of which were attached to iron and stone sleepers, fixed in the roadway. These tram-roads existed at the date of the lease, but they had since been much enlarged, and new tramplates had been, to a great extent, substituted. Upon a bill filed by the lessor to restrain an execution-creditor of the lessee from taking up and removing the iron railroads and tramplates, *Held*, that such movable chattels, as are referred to, were not included in the terms “works,” or “ways,” or “roads,” and the injunction granted by Stuart, V. C., against the creditor, was dissolved: *Duke of Beaufort vs. Bates*.¹

LORD CHANCELLOR.

Patent—Validity of Specification—Publication.—Although the construction of a specification belongs to the court, the explanation of technical terms of art, commercial phrases, and the proofs and results of the processes which are described in it, are matters of fact, upon which evidence may be given, contradictory testimony adduced, and therefore upon which it is the province of the jury to decide; but when those portions of a specification are made the subject of evidence and brought within the province of the jury, the direction to be given to the jury with regard to the construction of the rest of the specification, which is conceived in ordinary language, must be a direction given only conditionally; that is, a direction as to the meaning of the patent upon the hypothesis or basis of the jury arriving at a certain conclusion with regard to the meaning of the terms used, the signification of the phrases and the truth of the processes described in the specification: *Hills vs. Evans*.²

¹ 6 L. T., N. S. 82.² 6 L. T., N. S. 90.

Where there are two specifications of a patent to be compared, in order to arrive at a conclusion of fact, the right of drawing the inference of fact from the comparison belongs to the jury, and is a question of fact, and not a question of law. If something remains to be ascertained which is necessary for the useful application of the discovery, that affords sufficient room for another valid patent: *Id.*

To support an allegation of prior knowledge of an invention so as to avoid a patent, it must be knowledge equal to that required to be given by a patent, namely: such knowledge as will enable the public to perceive the very discovery, and to carry the invention into practical use: *Id.*

Will—Construction—Issue—Children.—A will made in 1794 contained the following gift over: "But if my said daughter, Grace, happen to die without issue, then and in such case, at the decease of my said daughter, I give and bequeath the said sum to my two daughters, S. and E., equally to be divided between them, share and share alike, if then living" (that is, living at the death of the testator's daughter, Grace); "but if either of my said daughters, S. and E., should be then dead, then I give and bequeath the share of my daughter so dying to her issue, equally to be divided among them, if more than one." Held, that the word "issue" did not confine the gift to the children of the testator's daughters, but that the remoter issue were also entitled: *Weldon vs. Hoyland*.¹

ROLLS COURT.²

Landlord and Tenant—Agreement for a Lease—New House—Implied Contract—Complete State of Tenantable Repair.—The defendant having agreed with the plaintiff to take and execute a lease of a new house, with certain covenants to repair, &c., entered into possession of the house. Soon after serious defects appeared in the structure of it—the ceilings falling, and settlements taking place; besides which, the water and other pipes were not properly fitted or finished. The defendant quitted the house, having refused to execute the lease when tendered to him for that purpose, on the ground generally that the house was not in a complete tenantable condition when he entered it, and the expense he must incur if he executed the lease with the proposed covenants in it. The plaintiff accordingly filed the bill in this suit to enforce specific performance of the agreement

¹ 6 L. T., N. S. 96.

² 6 L. T., N. S. 98.

by the defendant. *Held*, that the bill must be dismissed—the costs to follow the event: *Tildesley vs. Clarkson*.

There is, in such cases, an implied contract on the part of the landlord to finish and deliver the house to an incoming tenant in a complete tenable state of repair, proper for a house of the character agreed to be demised: *Id.*

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF NEW YORK.¹

Parol Evidence to Explain a Written Agreement.—Where money was loaned by a citizen of New York, to a firm doing business at Davenport, Iowa, and the money was remitted to them at that place, and a certificate of deposit taken, dated at Davenport, by which the borrowers acknowledged the receipt of the money, and promised to pay the same to the order of the lender, one year from date, on the return of the certificate, with interest at the rate of ten per cent. per annum; *it was held*, that in an action upon the certificate, parol evidence could not be received to prove that it was a part of the contract that the principal and interest money mentioned in the certificate should be payable at P., in the State of New York: *Potter vs. Tallman et al.*

When parties choose to put their contract in writing, courts are to ascertain the place where the contract was made, the time when, and the place where the money is payable, as well as the rate of interest, by reference to the written instrument: *Id.*

Bailees—Common Carriers.—If goods are taken from a bailee by the authority of law, exercised through regular and valid proceedings, it will be a defence to an action by the bailor, against him: *Bliven et al. vs. The Hudson River Railroad Company.*

The bailee must assure himself, and show the court that the proceedings are regular and valid, but he is not bound to litigate for his bailor, or to show that the judgment or decision of the tribunal issuing the process, or seizing the goods, was correct in law or in fact: *Id.*

This is the rule as to bailees in general; and it includes the case of common carriers: *Id.*

¹ From Hon. O. L. Barbour, Reporter of the Court.

Railroad Companies, as Carriers of Passengers.—The plaintiff, after having paid his fare from New York to Albany, in a passenger train, and travelled a part of the distance, left the train, giving up his ticket, and receiving a conductor's check in exchange. He subsequently got upon a freight train, and continued his journey in a caboose car, sometimes used for carrying passengers. His fare was at first demanded, and paid, but subsequently the conductor returned the money, and allowed him to ride in the freight train by virtue of his ticket. While so riding, the plaintiff was injured, by means of a collision. *Held*, that after receiving the plaintiff on a train upon which other persons were carried for hire, demanding fare from him, then returning it, and recognising his ticket as evidence of a contract authorizing him to be carried without further charge, it was too late for the defendants to say that he was wrongfully there, or was guilty of any fault in leaving the ordinary passenger train and travelling upon a freight train: *Edgerton vs. The New York & Harlem Railroad Company*.

Held also, that it did not lie in the mouths of the defendants to say that the caboose car was so manifestly dangerous that the plaintiff was guilty of negligence in getting into it to ride; and that there was nothing in the conduct of the plaintiff to prevent his recovering for his injuries if they were sustained in consequence of any fault or misconduct of the defendants: *Id.*

Carriers of passengers are bound to carry safely those whom they undertake to carry, as far as human care and foresight will go. When an injury is sustained by a passenger in consequence of anything in the construction or management of the vehicle or the machinery of transportation, the carrier is responsible, if any exercise of care or foresight would have prevented it: *Id.*

Sheriff's Sales—Statute of Frauds—Principal and Agent—It seems that a judicial sale by a sheriff or referee, or other officer of the court, is not within the provisions of the statute of frauds, requiring the contract of sale to be subscribed by the purchaser or his agent. If it be, however, the written report or certificate of the referee, or the note or memorandum made by the auctioneer, will satisfy the provisions of the statute, and remove all objection to the validity of the contract to purchase, on the ground that no written contract was subscribed by the purchaser: *Hege-man vs. Johnson et al.*

Where one purchases property at a judicial sale, as the agent of another

and in his name, but without authority from the principal, and consequently the contract is not binding upon the latter, the agent is not personally liable in an action upon the contract; nor can he be compelled, by the exercise of the equitable jurisdiction of the court, to perform it as his own: *Id.*

Sureties, how Relieved.—If a judgment has been irregularly obtained, sureties can be heard, if they apply seasonably, on motion to set aside the judgment and let them in to defend the original action. They may also be allowed, for their own protection, to defend an action brought against their principal: *Jewett vs. Crane.*

Sureties in actions are not permitted generally, at the trial of an action for the breach of their undertaking, to show that the practice or proceedings in the action wherein their undertaking was executed, were irregular. Irregularities in practice are corrected on motion: *Id.*

Former Writ or Recovery.—When it appears on the very face of a judgment that the plaintiff's demand was not passed upon by the court, but that the plaintiff applied for a discontinuance, and on its being refused he declined giving any evidence, and the court merely considered the counter claim of the defendant, and gave a judgment in his favor for the amount, the plaintiff may bring another suit for the demand which he declined to submit for adjudication in the former action: *Jones vs. Underwood.*

In an equity action for an account, sums received by the accounting party after the commencement of the action may be included in the account taken; but in case those sums are not included, the party entitled to them is not precluded, by the judgment, from commencing another suit to recover the amount: *Tyler vs. Willis.*

Usury—Purchase of a Usurious Note.—An agreement, by borrowers, to pay to the lender one-third of the profits of their business as co-partners, in addition to the legal interest, for the use of the money loaned, is usurious and void: *Sweet vs. Spence.*

And a promissory note, given by the borrowers, in performance of such an agreement, being void, furnishes no consideration for a note given by a third person to the lender, on the purchase of the original note by them: *Id.*

Partnership.—Where a promissory note is made by one of the partners in a firm, and the partnership name is subscribed thereto by him, by which the firm *jointly* and *severally* promise to pay to the payee the sum specified

therein, the partner who made the note may be sued upon it alone, without joining the other as a defendant: *Snow vs. Howard*.

Misjoinder of Parties, Demurrer for.—When two or more plaintiffs unite in bringing a joint action, and the facts stated do not show a joint cause of action in them, a demurrer will lie, upon the ground that the complaint does not state facts sufficient to constitute a cause of action: *Mann & Wife vs. Marsh*.

When husband and wife unite in bringing an action, and the complaint shows that one alone should bring the action, without the other, a demurrer will lie for the same reason: *Id.*

Mandamus.—As respects judicial duties, the writ of mandamus merely commands the court or officer to proceed without directing in what manner the duty shall be executed: *The People ex rel. vs. Baker*.

A referee may be compelled by mandamus to settle a case and exceptions, and to settle it correctly. But before the writ will be issued to compel the settlement in a particular way, it must be made to appear that when so settled it will be according to the facts: *Id.*

The return to a writ of mandamus must be good, tested by the ordinary rules of pleading, both in form and substance. It should state facts and not evidence, and should be certain to a common intent. The relator may demur or plead to all or any of the material facts contained therein: *Id.*

A mandamus directing a referee to settle a case and exceptions, should contain appropriate recitals from which it will be seen that the case and exceptions, when settled according to the requirements of the writ, will give a true history of the trial, especially in the particulars therein specified: *Id.*

The court will not command the case to be falsely settled, but only according to the truth: *Id.*

If the relator demands that a case and exceptions be settled in a particular way, without showing any right to have them so settled, the writ will be held defective in substance: *Id.*

Where the defendant avers, in his return to the writ, that he has duly and truly settled the case according to the truth, and that to settle it in the manner required by the writ would be contrary to the truth, this will be held to be a full and perfect answer: *Id.*

Matters arising *pendente lite*, on a proceeding by mandamus, may be set up by the parties by answer or plea: *Id.*

It seems a writ of mandamus may be amended after return, and demurrer thereto: *Id.*

SUPREME COURT OF CONNECTICUT.¹

Mortgage to secure Future Advances—Rights of subsequent Lien Creditors—Set-off—Whether Property of a Foreign Sovereign can be Attached—After acquired Property when bound by a Mortgage.—R. & L., in January, 1852, entered into a written contract with the respondents, that with the aid of \$40,000, to be advanced by the latter, they would purchase land, erect thereon a factory, equip it with all necessary machinery, and manufacture 20,000 rifles for the respondents on or before January 1, 1855; the land and factory to be conveyed to the respondents and the legal title held by them until the contract was performed; the stipulated price of the rifles to be paid on delivery, and a deduction of \$2 per rifle to be made from such payments for the repayment of the \$40,000 advanced. R. & L., with the aid of the money thus advanced, bought the land and built and equipped the factory, expending more than \$100,000 for the purpose. The land was conveyed, by the party from whom it was purchased, directly to the respondents, who thereafter held the legal title. In 1854, R. & L. made a mortgage of the premises to a party to secure a debt of \$75,000 for machinery purchased to put into the factory. The mortgage was immediately put upon record, but did not come to the actual knowledge of the respondents until December, 1855. R. & L. had from the first been embarrassed from the want of sufficient funds, and it had been necessary for the respondents to make them large advances from time to time, to enable them to perform the contract, and to prevent their failure. These advances they continued to make down to October, 1856, when R. & L. failed, leaving the contract for the manufacture of 20,000 rifles not fully performed. At this time the balance due to the respondents on account of these advances, beyond the original advance of \$40,000 (and certain other advances specially secured), was over \$75,000. The mortgagee had taken his mortgage with knowledge of the contract of R. & L. with the respondents, and he afterwards assigned it to a party who, at the time he took it, had such knowledge. On a bill to redeem, brought by the assignee of the mortgage, it was held, 1. That the absolute legal title being in the respondents, they were not affected by the record of the mortgage in 1854, and that any advances which they might have made down to December, 1855, when they received actual notice of the mortgage, constituted a valid charge on the real estate, which took precedence of the lien created by the mortgage. 2. That after they received actual notice of the mort-

¹ From John Hooker, Esq., State Reporter.

gage, the respondents still had the right to make all advances to R. & L. which were necessary to enable them to perform the contract, and that these advances became a charge on the real estate precedent to the lien of the mortgage : *Rowan vs. Sharp's Rifle Manufacturing Company*.

The contract of 1852, between R. & L. and the respondents, contained a provision that the latter, on giving certain notice, might, at their election, take the entire property at an appraisal. The respondents elected so to take it, during the pendency of the bill to redeem. The petitioner thereupon filed a supplemental bill, setting up this fact, and praying for a decree that the balance of the fund, after paying the prior claim of the respondents upon it, should be paid over to him. The petitioner held the mortgage in behalf of the British Government, and the suit was brought for the benefit of that Government. The respondents filed a cross bill alleging a claim against the British Government, in part for moneys withheld as a stipulated forfeiture for the non-performance, within the time limited, of a contract with the British Government for the manufacture of rifles, the delay in the performance being alleged to have been caused by the wrongful interference and tortious acts of the agents of the British Government, and in part for damages for tortious acts of such agents in injuring parts of rifles submitted to them for inspection under the contract. The petitioner denied the right of the respondents to make the set-off, on the ground that the claim was founded on tort, and that the British Government, having attachable property within the State, could be sued by the respondents in an action at law. *Held*, that the respondents could set off the claim for moneys so withheld, which was to be regarded as a claim founded on contract. Whether they could set off the claim for the damages : *Quere : Id.*

Whether the British Government, having attachable property in this State, could be sued in our courts : *Quere : The court inclined to the opinion that it could not : Id.*

Where a mortgage of a factory and its equipments embraced in its terms such machinery and stock as should be afterwards purchased and placed upon the premises, and the mortgagee had afterwards taken possession of the factory with such subsequently acquired property, it was held that, whatever effect was to be given to the provision in itself, it became operative upon possession being taken by the mortgagee, so as to make the mortgagee chargeable with the property in favor of later incumbrancers, as a part of the mortgage fund : *Id.*

SUPREME COURT OF MASSACHUSETTS.¹

Municipal Corporation—Liability for Obstruction of Highway.—A large vehicle used as a daguerrean saloon, standing partly within the limits of a highway, but outside of and several feet from the travelled path, is not a defect in the highway, which will entitle a traveller to recover against a town damages for the injuries sustained by him, if his horse, while driven by himself, is frightened thereby, and becomes unmanageable, and runs for some distance, and upon an embankment, so that the carriage is broken, and himself thrown upon the ground and injured: *Keith vs. Inhabitants of Easton.*

Case—False Representations of Credit.—No action can be maintained to charge a defendant upon or by reason of false representations concerning the credit and ability of another, made in order to induce the plaintiff to indorse a note signed by such other person, which the defendant received and used for his own benefit, unless the representations were made in writing: *Mann vs. Blanchard.*

Witness—Husband and Wife—Books of Original Entries.—In an action against an executor to recover the price of goods sold and delivered to the wife of the testator in his lifetime, she cannot be allowed to testify to a private conversation with her husband in which he ratified her purchases; but she is a competent witness as to other facts. And the plaintiff's books of account are inadmissible to prove that credit was given to the testator; but they, in connection with his suppletory oath, are admissible to prove the delivery of the goods: *Dexter vs. Booth.*

Mortgage to Secure Support and Maintenance of Mortgagees—Condition when Broken.—The condition of a mortgage, which provides that the mortgagor "shall well and comfortably support and maintain" the mortgagees, "in sickness and in health, for and during their and each of their natural lives, providing things necessary for their comfort and comfortable subsistence while in health, and suitable medical attendance and nursing when sick, during the term of their natural lives as aforesaid," is broken, if the mortgagor, after knowledge that they are at a reasonable place, where they intend to receive their support, declares to the person in whose family they are that he will not pay for their board there, and afterwards neither pays nor offers to pay anything therefor, although no special demand upon him is made for such support: *Pettee vs. Case.*

¹ From Charles Allen, Esq., State Reporter.

Towns—Gift to Public Use—Condition.—A town may erect a town-house of sufficient capacity for all the business which it may have occasion to do in such a building, and may, in its erection, make suitable provision for its prospective wants; and if the building contains room not wanted for the time being for municipal business, the town may let them temporarily, or allow them to be used gratuitously. And the condition of a deed of land to the inhabitants of a town, which provides that the same shall "not be used for any other purpose than as a place for a town-house for said inhabitants," is not broken by the erection thereon of a town-house with a hall in the second story, which has been used for miscellaneous purposes, and rooms upon the sides of the entrance, which have been let and used for shops and other purposes not connected with municipal business, and the construction and use for several years of a lock-up under the building: *French vs. Quincy*.

NOTICES OF NEW BOOKS.

SUBSTITUTED LIABILITIES: Being a comparative view of the Civil Law and the Common Law on the doctrines of Subrogation, Novation, and Delegation. Part I. on Subrogation. Cambridge: Printed by Allen & Farnham, 1861; Philadelphia. CHILDS & PETERSON.

The illustration of treatises on Common Law subjects, by reference to the writings of continental jurists, has no doubt been somewhat overdone of late years. Since Judge Story set the fashion, it has become a constant practice to lard law books over with quotations from the Pandects, and from all the classical and mediæval jurisconsults, which, if not of much intrinsic value, give, it is supposed, a certain flavor and finish to the work. So fixed is this habit, that on certain topics there are now stock citations, which are handed down from one author to another, like heir looms, and to omit them in their customary places would be considered as a sure proof of a plebeian taste, or of an affectation of originality. Yet very often, the only end they serve is to let us know that the Civil Law either agrees or disagrees with our own, on points which are perfectly well settled, and which need neither illumination nor development from any other source. The information thus given may be interesting to the student of comparative jurisprudence, as it would equally be if it related to the state of the Chinese or Hindoo law on the subject; but there is no reason why it should be conveyed in long Latin paragraphs, dug out of Cujacius or the Digest, when a simple statement of the fact would answer every purpose.

There are, however, branches of jurisprudence in which a careful study of the Roman law, and particularly of its modern exponents, is really of the greatest importance. Such, especially, are certain leading doctrines of equity, which, having been grafted upon our law from the continental systems, do not exhibit the same spontaneous active growth which characterizes the native plant. To drop metaphor, as the principles on which these doctrines are founded are foreign to the Common Law, it is necessary, for their proper development, to recur constantly to the source from which they were at first taken. No better illustration of this can be found than the doctrine of Subrogation, which is the subject of the very valuable and learned treatise, the title of which we give above. The fundamental notion of Subrogation involves that of the assignability of debts and other rights of action, which does not exist at Common Law. It further excludes, to a great degree at least, the artificial rules and distinctions as to the effect of payment upon obligations, of which our old books are full. This being so, it is plain, that on the occurrence of novel points we are deprived of the wider analogies of our own law, and indeed are often embarrassed by the habit of thought which it imposes on us. The practical extension of this doctrine, for instance, has long been impeded, by an obstinate adherence of English judges to the old rule, that payment by one of two joint debtors extinguished the whole obligation, so that his only remedy against the other was in a distinct suit for contribution. On the other hand, where a course of decisions has become established which differs from the Roman law, we need to be warned of the fact, lest we should draw too hastily on the doctrines of the latter.

The treatise before us coincides very much with the idea suggested in these observations. The author has undertaken a comparison of the principles of the Roman Jurisprudence and those which obtain in England and this country on the subject of Subrogation, in order to exhibit their fundamental points of difference as well as of resemblance, so as to supply the student at once with a most valuable store of new material, and with the means to use it intelligently and safely. The task is accomplished with much ability; the writer possesses a thorough grasp of his subject, and, while he has avoided any parade of learning, has embodied in his pages the results of an extensive reading. The style is very simple and clear, and the logical continuity of thought more carefully kept up than usual. The book is one which we can heartily recommend to our readers.

H. W

THE

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THE JURISDICTION OF THE COURT OF CHANCERY TO ENFORCE CHARITABLE USES.

(CONTINUED.)

In the reign of Queen Elizabeth the subject of Charities attracted more fully than before the attention of the legislature. It was thought expedient to establish a Board of Commissioners for Charitable Uses. The first statute regulating the subject is the thirty-ninth of Elizabeth, chapter six; the second was passed in the forty-third year of the same reign, chapter four. The true office and functions of these statutes was not to create a new authority, but to exercise an already existing jurisdiction in a new manner. This is shown

1. *From their terms and phraseology.* The first one shows most clearly the intention of the legislature. The preamble recites that charitable gifts, which are enumerated, had been and are still like to be *most unlawfully* and uncharitably converted to the lucre and gain of some few greedy and covetous persons, contrary to the true intent and meaning of the givers and disposers thereof; the end of the act being that the uses may from henceforth be observed and continued according to their true intent. It is then

provided, that the Chancellor may award commissions to the bishop of the diocese and other persons with a jury to inquire of such gifts and of the abuses, misdemeanors and frauds which have arisen, &c., so that the intent of the donor cannot be performed. The statute, 43 Elizabeth, is nearly like the first in its phraseology, although the reasons for enacting it are not so distinctly stated. This language is so clear in its meaning that Mr. Boyle says, that the statute *professes* to be a measure purely remedial, and that it leaves the original jurisdiction of the Court of Chancery as before.¹

2. The subjects embraced within the statute lead to the same conclusion. Corporate foundations, as well as those which are unincorporated, legal gifts, as well as those which are equitable, are provided for. Thus a statute passed in the eighteenth year of Queen Elizabeth's reign² had exempted all manner of conveyances to the use of the poor from the statutes of mortmain, and had expressly enacted that it should be lawful to give to any person or corporation for their benefit, and yet the poor are mentioned in these acts in the same connection with other gifts and appointments of a charitable nature. These statutes apparently establish a power of visitation. There is no word or line in them which purports to create a *new capacity* to take property. When the legislature intended to give capacity they knew how to express themselves, as will be seen in the 18th Elizabeth just cited, explained by an act passed in the 39th Elizabeth, c. 5, immediately preceding one of those in question.

3. The decisions of the courts sustain this view. "Thus," says Duke, "the Commissioners cannot by their decree make a corporation not before incorporated, and enable them to take charitable uses as a corporation." They may, however, cause trustees to convey, from time to time, so as to keep up the number originally appointed. This, as has been seen, could have been done by the Court of Chancery without reference to the statute.³ It is true

¹ Boyle on Charities, p. 12.

² Arnold vs. Barker, *supra*, p. 339.

³ 18 Elizabeth, c. 3, § 9.

that an unwarrantable extent was given to uses defectively created *in point of form*. This was through a forced construction of the words "given, limited, appointed, and assigned," employed in the statute in respect to the methods in which charities were created, and especially of the word "limited." The word "limited" enlarged the power of disposition,¹ and *the statute of wills*, as well as of mortmain, was, *pro tanto*, repealed or modified. But no statement is to be found that a *new capacity* to take property was created in the devise beyond modifying the restrictions of those statutes. No decision, it is believed, can be found, where the Commissioners were held to have acquired a power to establish a use which, before the statute of charities, by the general rules of equity jurisprudence would have been intrinsically void, nor does any case adjudged by the Commissioners go farther than Symond's case, before noticed.² Many defective *methods* of raising a valid use were, however, sanctioned. The peculiar cases arising under this statute were of this class. *Damus'* case was a will of personal property made by a married woman, who was administratrix. The will was void *at law*, because a married woman cannot make a will, but good by the statute of charities. It was her duty, as administratrix, to appropriate the property to pious uses.³ *Collison's* case was a will made seven years before the statute of wills, to a charitable use. It was held to be a good "limitation" under the statute of charitable uses.⁴ Many similar cases might be cited. On the question of capacity of unincorporated persons to take a charitable use, as devisees, the decisions do not appear to be different after the statute from those made before.

4. A similar conclusion may be derived from the nature of the Commissioners' authority. Matters appear to have come before the Chancellor, to have been in part disposed of by him, and then to have been referred to the Commissioners.⁵ They were not an independent tribunal. It is true they could make a decree, but could not enforce it if it were disobeyed. They must call on the

¹ Boyle on Charities, p. 18.

⁴ Moor's Rep. p. 888.

² P. 389, *supra*.

⁵ Duke on Charitable Uses, 50.

³ Sir F. Moor's Reports, p. 822.

Chancellor to imprison the recusant party.¹ If they issued a summons to a party, and he refused to attend, they certified the fact to the Lord Chancellor. This functionary expressly declared in one case, as a reason why the party should appear before them, that otherwise the breach of *trust* would go unpunished, unless in *Chancery*, which were a *tedious and chargeable suit for poor persons*.² The object of the commission, probably, was to save expense by causing a summary inquiry to be made with a jury in the counties where the property given to charities was situated. It proved to be a piece of cumbrous machinery, and soon fell into disuse.

5. It was wholly in the discretion of the Chancellor to do what he saw fit in respect to their decrees. "Thus," says Moore, "it is in *the breast of the Chancellor* to award the commissions, or to confirm or annul the decrees, by which he can prevent or avoid their multiplicity perfectly well." It will be remembered that Moore penned the statute of charities.³

6. Shortly before the time of Queen Elizabeth it had been customary for the crown to issue special commissions to hear equity causes. This practice, originating in the reign of Henry VIII., was greatly resorted to at the close of the Queen's reign, on account of the illness of the Master of the Rolls, and the pressing nature of the Lord Chancellor's engagements. The Chancellor himself made similar delegations of authority, which were greatly complained of, and were the subject of a statute. These were only delegations of cases which the Chancellor could have heard if he had seen fit.⁴ The statute commission of 43 Elizabeth is thus readily accounted for. It would have been simply impossible for the Chancellor to have heard the cases in the respective counties, and on so important a subject it was desirable that a commission should have the sanction of a statute. Besides, as the inquiry was to be by jury, legislation was absolutely essential.

For these reasons, among others, it is submitted that there is no reason to believe that the law of charities rests upon the statute of Elizabeth.

¹ Duke on Charitable Uses, 158.

² Duke 69, 5 Car. I. Original edition.

³ Rivett's Case, Moore's R. 890.

⁴ Hargrave, Law Tracts, 810.

Informations in Chancery.

The question whether an indefinite charitable gift could have been enforced prior to the 43d Elizabeth by means of an information filed in Chancery by the Attorney-General, has elicited much discussion. This question is important in its bearing upon charitable gifts which were not valid at law. There is some direct evidence that such a proceeding was adopted. Probabilities are also in its favor. The reasons for this conclusion are,

I. Informations by a public officer were proper proceedings in Chancery long before the statute of Elizabeth. This might be inferred from the general analogies to be derived from proceedings in other courts, and can be shown by authority. Thus, in the Year Book, 1 H. VII., 18, it is said, that in certain cases, when a trespass is committed and an information is made in Chancery, a writ will issue for the farmer of the King and thus he will have the assistance of the King.

So in another case,¹ the Attorney of the King asked the Court to establish, by "mere surmise," the right of the King against one who was claimed to be seised to his use. It was urged in opposition, that the King should have his remedy by *subpœna* and not in this manner. The Chancellor agreed with this view, and said that, as the matter touched the Commonwealth of the realm for all time to come, a *subpœna* was necessary. The Attorney-General must have proceeded in such a case by an information.

In fact, at the close of the reign of Queen Elizabeth, informations had become so common that it was necessary to make a public statement that they did not abate by her death. All the Judges resolved that informations for the Queen in any "Latin Court," *should not* abate, but should be continued, and that all informations in the "English Courts" *do not* abate, because no continuances were necessary. It is superfluous to add that, the "Latin Courts" mean the Common Law Courts, and the "English Courts" embrace the Court of Chancery.²

¹ Year Book, 4 H. VII. 5, case 10.

² Moore's Reports, p. 748. *Demise le Roy.*

Informations in Chancery were absolutely necessary to enforce a use in behalf of the King. The King could, as is well known, take a use. Thus Empson and Dudley were seised to the use of the King.¹ So Crompton says, "If one is enfeoffed to the use of the King, he shall have a *subpœna*, and though he is a *politic body*, he can take a use."² He must therefore have taken it in his public capacity, or as representing the public. No reason can be perceived why he could not take a charitable use which is public in its nature. All the King's Courts were open to him, and he had his election in which of them to sue, according to the nature of the case.³ This is the rule at the present day. A *legal* right on the part of the public to a charitable use, can be enforced by information in Chancery.⁴ A petition was filed in Chancery in the time of Henry VIII., by W. Whorehood, Attorney-General.⁵

II. An information in Chancery could be used to *establish* a title to wardship, and to determine what person should have the care of infants, at least of the "King's infants." The King was interested as "*parens patriæ*" in watching over those who were unable to protect themselves. It will be observed that this proposition bears closely upon our subject, for if the right of the *infant* could be in this manner established, no reason can be given why the royal protection should be withheld from the poor.

In the Year Book, 1 Ed. V., p. 6, an information of this kind was filed, upon which a *subpœna* was granted in the regular course of Chancery procedure. The case came before the Bishop of Lincoln, Chancellor, and Choke and Catesby, Justices. The information was filed by Townsend, Sergeant of the King, and it was stated to the Court, that one William Fowler, being possessed of the wardship of the body and the land of one S., granted his right to Davis, whose estate was confirmed by letters patent from the King. Pole, the defendant, having possession of the ward, was required by *subpœna* to bring him before the King in his Chan-

¹ Statutes 1 H. VIII. chap. 15.

⁴ Attorney-General vs. Galway, 1 Molloy, 102.

² Jurisdiction of the Courts, p. 54.

⁵ Hargrave's Law Tracts, 312.

³ Year Book, 39 H. VI. 26, case 36.

cery. At the return day, Pole appears by his counsel, and claimed that the information was not sufficient to compel him to bring in the ward's person. It appeared in the discussion that the information was not sufficient, and the Justices state what it is necessary to show in order that the possessor of the ward shall be placed upon his defence. At that time, it seems if an "office" had not been found for the King, it must have been stated in the information, that the infant's ancestor had died in the homage of the King, or that the King had been in possession of the person of the ward. It was said by Choke, J., that such an information could be made by parol; that the party who filed it,¹ *that is, the guardian in fact*, can amend by parol a written information, and that when it becomes sufficient, the opposite party must respond. Then the ward is delivered to the Court, and the Court, who is "the third person," shall deliver him to one of the Masters in Chancery, in the custody of the Lord Chancellor, until the right is determined.² We are, unfortunately, deprived of an account of the rest of the case, because on the adjourned day "Richard Plantagenet claimed to be King of England, and on the same day proclaimed the day of his coronation, by force of which all the Courts of England were discontinued." The case proves, that informations were used to establish title to wardship; that the guardian in fact, claiming title, controlled the proceedings by making use of the name of the King. It was substantially a question between one supposed guardian and another. The *reasons* given for the interference were undoubtedly narrow.³ The fact remains, that in *certain cases*, on general principles of equity jurisprudence, an information was proper to establish title to a ward. It is now settled that the jurisdiction of the Court is exercised by the Chancellor, as a part of the general delegation

¹ Such a person would now be called "relator." Nearly every principle now applied to informations in Chancery, is found in these old cases.

² The subject is spoken of by Choke as though it were perfectly familiar law. There is proof that he was well acquainted with the rules prevailing in Chancery.

³ Dower could, at that time, be recovered in Chancery only in the case of "King's widows," or those whose husbands held directly of the King. Year Book 1 H. VII 18; 4 Id. 1.

of the authority of the Crown by virtue of his office, without any special warrant.¹

The statement of Sir Joseph Jekyll seems, therefore, warranted by way of analogy. Speaking of the power of the King over infants, he says, "In like manner, in the case of charity, the King, *pro bono publico*, has an original right to superintend the care thereof, so that, abstracted from the statute of Elizabeth relating to charitable uses, and antecedent to it, as well as since, it has been every day's practice to file *informations* in Chancery, in the Attorney-General's name, for the *establishment* of charities." Lord Somers had said before him, that there were several things which belonged to the King as *pater patriæ*, and fell under his care and direction, as infants, charities, &c.²

III. A like inference is to be drawn from the practice in the Star Chamber and Court of Wards. Crompton continually illustrates Star Chamber practice by that in Chancery. The defendant was called into that Court by subpoena.³ Cases were presented on bill or *information* to the Chancellor, for the King.⁴ When the proceeding was between one individual and another, it was by bill in analogy to suits in Chancery; in other cases, by information. The forms of practice are so much alike, that Crompton continually makes reference from one to the other. "For commission of rebellion, (see Chancery)."⁵ A case of charitable uses was presented in the Star Chamber in the forty-fourth year of Elizabeth, concerning the poor of a parish.⁷ This could not have been done under the statutes of Elizabeth, for the Star Chamber is not mentioned in the act, and must, as it would seem, have taken place by information, according to what has already been said of the sys-

¹ Story's Equity Jurisprudence, Redfield's Edition, 1861, and cases cited.

² *Eyre vs. Shaftesbury*, 2 P. Wms. 119.

³ *Cary vs. Bertie*, 2 Vern. 342.

⁴ Crompton on the Jurisdiction of the Courts, written in 1594, p. 29.

⁵ *Id.* p. 84. See bill on information al Chauncellor pur le roy.

⁶ *Id.* p. 82.

⁷ *Banister's Case* in the Star Chamber, 44 Eliz.; *Duke on Charitable Uses*, Moor's Reading, 189.

tem of practice. The case was as follows: a gift was made to a parson and his successors to the use of the poor of the parish; the parson made a lease for *thirty* years; the lessee did not perform the use, and the *poor* made an entry. It was resolved that the *gift was good*, and that the lease for so many years was good also, notwithstanding the statute 13 Eliz. cap. 10,¹ because it could not tend to the impoverishment of the parson's successor, insomuch as it was given to a charitable use. This shows that the Court *established* the use, and also that it was regarded as a trust in the parson. Most of the Star Chamber cases of this kind would be decided by the Chancellor without assistance.

So in the Court of Wards,² informations were employed to establish uses in favor of infants who were wards of the King or Queen. The ordinary process in that Court was by bill, when an infant's rights were to be protected by information filed by the King's Attorney. In this manner the infant obtained a decree establishing his right against feoffees.³

IV. The policy and condition of England were altogether favorable to the enforcement of every gift in charity. At an early period there was an opportunity to test the principles of English Kings and Barons upon this topic. The great military order of Knights Templars had been dissolved, and the question arose whether the lands which had been given to them for the defence of the church and for "liberal alms-giving," (*largitionem magnificam*) should escheat to the King and divers other lords. The judges had been asked whether these lords could retain these lands by the law of the realm, and *with safe conscience*. They had warily and cautiously replied that they could retain them by

¹ This statute prevented parsons, among others, from making leases in such a manner as to impoverish their successors. Any lease made by them could not exceed *twenty-one* years.

² This Court was created in the reign of Henry VIII. (82 Id. c. 46), to take oversight of the affairs of infants, "natural fools," &c., and this class of cases were withdrawn from Chancery while that Court continued.

³ *Boydell vs. Walthall*, 88 and 84 Eliz., Moor Rep. 722; *Georges vs. Stanfield*, Id. 718; *Forster's Case*, Id. 717.

the law of the realm. Upon a great conference, it seemed good to these noblemen assembled in Parliament, for the health of their souls, and for the discharge of their consciences, that these lands should not escheat nor pass by inheritance to private persons, but that they should be devoted forever to the pious uses for which they were originally granted. The titles which had already vested at law were divested by this act,¹ and the lands were conferred upon the Brethren of the "Hospital of St. John of Jerusalem" to the same uses for which they were originally granted. This is a clear instance of the application of the principles of equity jurisprudence concerning charities. The great trusts were not to fail for want of a trustee. It is true that the power of Parliament was invoked, but the boundaries between the jurisdiction of the Courts of Equity and Parliament in respect to uses, were not closely drawn for a century or more afterwards. So, says Mr. Boyle, "when we find in books of ancient date applications talked of to Parliament, we naturally at the present day transfer our ideas to Courts of Equity as the more appropriate tribunals."²

The same principle was applied by the Court of Chancery in England at our revolution, when the College of William and Mary in Virginia had passed under our control. The college having ceased to be an English corporation,³ a new arrangement was made in respect to charitable trusts previously held by it.

The condition of England for centuries made it her imperative duty to provide for the poor. Statutes were continually passed to arrest the evils growing out of the fact that "stalwart and valiant beggars" imposed upon the public, and the unfortunate poor had no means of support. A list of the statutes from the earliest period to the time of James I., will be found in our note.⁴

¹ 17 Ed. II., stat. 2, A. D. 1324; 1 Statutes of the Realm, 194.

² Boyle on Charities, 267. See also 1 Spence Eq. Jurisd. 332.

³ Attorney-General *vs.* Mayor of London, 1 Brown Ch. Cas. 171.

⁴ See 23 E. III. c. 7; 7 R. II. c. 5; 12 do. c. 7, 8, 9, 10; 11 H. VII. c. 2; 19 do. c. 12; 22 H. VIII. c. 12; 27 H. VIII. c. 25; 28 H. VIII. c. 6; 31 H. VIII. c. 7; 33 H. VIII. c. 17; 37 H. VIII. c. 23; 1 Ed. VI. c. 8; 14 Eliz. c. 5; 39 Eliz. c. 4; 43 Eliz. c. 9.

The statesmen of that time were busily occupied with the perplexing problems concerning the care of the poor, even before the dissolution of the Monasteries. The first statute of Henry VIII. regarding them, was passed five years before any of the Monasteries were dissolved. The preamble speaks of "the great and excessive number of vagabonds and beggars." The second statute, passed before even the smaller Monasteries were broken up, provided for the collection of alms to be gathered upon every holy day or festival day by the churchwardens, for the poor and impotent sick, and no money was to be given in alms except so far as it was contributed in this way. All persons who were bound to pay sums in behalf of the poor could legally dispose of it in this manner. The statute is very extended and detailed, and shows that the dissolution of the Monasteries could not have been the cause of the beggary of the country, though it undoubtedly aggravated it.¹ Is it reasonable to suppose during this long period of years, while the State was straining every nerve to support the poor, teasing and *compelling* the people to be benevolent, allowing no Sunday of the year to elapse without a contribution in their behalf; can it be supposed, we say, that devises or legacies to this unfortunate class should be left without enforcement? It is morally certain that legislation would not have been delayed so long if there were no remedy by judicial decree. Donors of charities must have known, or must have supposed that a judicial remedy existed. Thus, in the year 1572, land was granted for charitable purposes to several feoffees, on their failure to *such persons as the lord keeper should decree upon complaint*, and on their failure, *to the use of the Crown to grant the same to charitable uses*.² Unless the Court of Chancery had an inherent jurisdiction upon this subject, can we imagine such a will to be made twenty-five years before the statutes of Elizabeth? The language seems to indicate the two-fold remedy by bill and information.

The statutes of Chantries cannot be urged against this view.

¹ Froude in his excellent view of the state of England at this period, takes this view. 1 Hist. pp. 74-84.

² Endowed Charities of London, p. 141.

Their object was to vest property given to superstitious uses in the Crown. It is true that the *language* of the first one, passed in the reign of Henry VIII., was far more sweeping. It would appear from its phraseology to have been the object to vest all charities in the King. This, however, was not the true intent of the legislature. Froude well explains it. The minds of men had been thrown into such a ferment by the dissolution of the monasteries, that they were seeking to resume all the property which they had previously devoted to charitable uses, &c. It was therefore a measure of policy to vest this property in the King, subject to a re-appropriation of it by him to charitable purposes.¹ The truth of this statement is evinced by the later statutes passed in the reign of Edward VI. and Elizabeth.² In these acts, the rights of the poor to any endowments were carefully protected, and in the latter one the Queen was authorized to convert property given for superstitious uses to charitable purposes. The ostensible design of the act was to reform charities, not to confiscate them. As Lord Coke says, in arguing Porter's case, "No time was so barbarous as to abolish learning, nor so uncharitable as to prohibit relieving the poor."

The decisions of the courts always conformed to this view; they distinguished between good and superstitious uses in the same instrument.³ So, if a charitable and superstitious use were connected, and the principal object was charitable, it was upheld. Thus, where the use, upon a devise made in 12 H. VI., was to sustain poor men to pray for the soul of the dead, it was held that though the direction was superstitious, the use for the poor must be supported, and that it was valid.⁴

The inference is, that charitable uses of all kinds were established and enforced. There was a method in the law by which they could be established, and every inducement in the facts of England's condition to cause the method to be put in exercise.

¹ 4 Hist. 486, 487.

² 1 Ed. VI. c. 14; 1 Eliz. c. 24, sec. 10.

³ Partridge vs. Turk, Moor, 698, 88 Eliz.; Porter's Case, 1 Coke, 226.

⁴ Case of the Skinners of London, 24 and 25 Eliz., in the Exchequer, Moor B 129.

The bearing of an authority showing that informations were used for the purpose of establishing charitable uses, may now be appreciated. It consists in a statement made by Sir Francis Moor, who renned the statute 43 Eliz., and whose "Reading" upon it is of the highest authority. He says: "There is given to the Lord Chancellor a directory, declaratory, additional and compulsory power by this statute, which he may exercise upon complaint by a *party grieved*, that the commissioners have not pursued their authority. A party grieved is whosoever hath *bonum omissum*, or *malorum commissum*, by the decree, whosoever is interested, and hath a property and ownership of *goods* and *lands* to his own use—whosoever, by the decree, hath prejudice either in law or equity—is 'party grieved,' and may complain by bill." On examining the statute, it will be found that this is a correct exposition of it. The language is, that "a party grieved may proceed by bill." Sir Francis Moor proceeds: "*But* where the prejudice is common or general, there every man may complain as an *amicus curiæ*, not as a party grieved, as where lands are given to repair bridges or highways, which are public easements, any man may complain if the decree limit the use to any other purpose.¹ It will be observed that he does not say that this method is given by the statute, and it is not to be found there. No one is provided for in the statute but the party grieved. The remedy by complaint, as "*amicus curiæ*," must therefore have previously existed.

Now, complaint by any one, as *amicus curiæ*, is an information. Thus it was said in an early case in the Exchequer Chamber, by all the Judges, that any man can show a fact in a proper case to *any Court which the King has*, as *amicus curiæ*, or *amicus juris*, and every man can *inform* the Court, &c. And the Chancellor said, speaking of the case then before the Court, where the insufficiency of an office is evident, any man has a right to present the matter as *amicus curiæ*, but where it is not evident, then no one can present it except the party *grieved*, taking the same distinction in the year 1468 which was taken in reference to his own

¹ Moor's Reading on the Statute of Charitable Uses, Duke, 167. The reading is also to be found in the Appendix to Boyle on Charities.

Court nearly one hundred and fifty years later.¹ The information could be made either to the Justices or to the King's Attorney. Thus proclamation was made that if any one wished to inform the Justices or the Serjeants of the King for the King, they should be heard.² Sir Francis Moor then means to state that a *charitable use of a general nature could be presented to the Court of Chancery by information*, where the Commissioners had made an erroneous decree in establishing a charity. This statement is nearly contemporaneous with the statute of Elizabeth, for Moor wrote within less than seven years after it was enacted. Duke makes a statement, that an information was a proper proceeding as an original method in Chancery, to enforce a charitable use. It is common to treat his statement as of little value, because it was made many years after the statute of Elizabeth, but the authority of a contemporaneous writer of Moor's special ability in this particular branch of the law, cannot thus be discarded.

Symond's case³ must have been decided upon similar principles. There was no *trustee*, because the bargain and sale was void for want of enrolment.⁴ It was the case of a charity enforced after the statute of uses and before 43 Elizabeth, where no trustee was named, and must have been by information.

If any one denies that the Court had an original jurisdiction of this kind, he may be pertinently pressed with the question, when did the remedy by information in cases of charity arise? It has been shown that informations were known to early equity jurisprudence; that they were used to establish uses for the King; that rights of wardships were also acted upon, and uses belonging to infants in ward were thus enforced; that some charitable uses were established against the heir, which could have been enforced in no other way; that they were numerous enough at the close of the reign of Queen Elizabeth to justify a resolution by the Judges; that they were not *mentioned in the statute of Elizabeth*, but were

¹ Year Book, 7 Ed. IV. 16, case 11.

² Year Book, 20 H. VI. 88. The reporter adds, "But no one came."

³ P. 839, *supra*.

⁴ Statute 27 H. VIII. c. iv. 5.

at once employed to correct erroneous decrees made by Commissioners in establishing charities, and a few years later were common for the purpose of establishing charitable uses. Is there any other instance in the law in which a remedy sprung suddenly into existence? Are not all other remedies, unless given directly by statute, clearly of a historic character?

Finally, it is no slight argument in favor of this view, that the dicta of so many distinguished English Judges may be found in its favor. 'Though not authority, they are valuable as representing the traditions which had come down to them. Among these we find the names of Justice Bridgman, Lord Somers, Sir Joseph Jekyl, Lord Northington, Lord Hardwicke, Justice Wilmot, Lord Redesdale, and Lord St. Leonards. On the other side is Lord Loughborough, who mainly relies upon the negative evidence of Porter's case. In that case land had been devised to A *upon condition* to perform a charitable use. The condition was broken, by making a lease, and the heir of the devisor entered for the breach, and conveyed to the Queen, for the purpose of having the charity enforced, as some think, though apparently without reason. The Queen then brought an information in the Court of Exchequer, against the lessee, for intrusion. It is urged that if the remedy by information in Chancery had then existed, it would have been selected by the Queen's advisers instead of this circuitous process. It must, however, be remembered, that the heir had a legal right to enter for breach of a condition concerning charities. This right was given by an express statute already referred to.¹ It does not appear that he intended to have the charity enforced, but probably meant to claim his strict right. No trace of the present existence of the charity (Nicholas Gibson's) is to be found in the book called "Endowed Charities of London." If, then, all the weight is given to Porter's case which can possibly be claimed for it, it does not *contradict* the authorities or invalidate the arguments urged upon the other side of the question.² Even after the statute of Eliza-

¹ 13 E. I., c. 41.

² Lord Loughborough seems to talk at random of this case. He says the cause was tried upon an *information* brought by the heirs, when the proceeding was insti-

both the heir could enter for breach of condition in cases of charitable uses. As it could not, for that reason, be urged that there was then no other method of procedure, so Porter's case does not prove that the method adopted there was the only one practicable.¹

On the whole, we may safely agree with Lord Redesdale, when he says, in substance, that the King, as *parens patriæ*, calls upon his courts of justice to take care of those who cannot take care of themselves; not only of infants, but of the sick and impotent poor.² This is done in the regular course of judicial procedure.

It is commonly stated by the writers of text books, that gifts to unincorporated bodies are not to be enforced by the Court of Chancery *as such* unless a trustee is interposed, and a passage from Lord Eldon's opinion in the case of *Moggridge vs. Thackwell*, 3 Vesey 35, is usually cited to sustain this view: "The general principle thought most reconcilable to the cases is that where there is a general indefinite purpose, not fixing itself upon any object, *as this is a degree does*, (meaning the case before him,) the disposition is in the King by sign manual; but where the execution is to be by a trustee, with general or some objects pointed out, then the court will take the administration of the trust." Lord Eldon's meaning has been misapprehended. He was endeavoring to distinguish between cases where the intention of the testator could not be ascertained, and where it could be determined by *judicial interpretation*. Thus he said, in the same connection, that the will was in that case in a degree definite. The language of the will was, that the "executor was to dispose of the property in such charities as he thought fit, recommending poor clergymen who have large families and good characters." If such language is "in a degree definite," it is not difficult to understand what he meant by "an indefinite purpose." In another passage of the same judgment he says: "When money is given to charity generally, without trustees or objects selected, the

tuted on behalf of the Queen. He must have explained Porter's case without examining it. *Attorney-General vs. Bowyer*, 8 Ves. 726.

¹ *Berd vs. Robinson*, New Bealoe Rep. 171, (2 Car.)

² *Id.*, 1 Bligh N. S. 847.

King is constitutional trustee," thus intimating that where either was designated, the charity could be enforced by the court. Besides, if he had any other meaning, his statement is not *exhaustive*, for he does not include in his propositions, in any form, the case where the object was measurably *definite*, such as the poor of a parish, and no trustee was selected. This can be readily perceived by a careful perusal of the passage.¹ The reporter undoubtedly has failed to give his exact language. The passage perhaps should read, "except that where the execution is by a trustee, with general or some objects pointed out, the court will execute the trust." The statement is then symmetrical, consistent with other parts of the judgment, in harmony with his main argument, and is confined to general and indefinite gifts. His proposition is at best a mere dictum, to which undue weight has been attached, for he lays no stress upon it himself, and is characteristically dissatisfied with it. The authorities and the reason of the thing are essentially opposed to the idea that a trustee is necessary. There is a crowd of decisions that sustains the doctrine, that if a trustee dies before the testator, or is removed before his death, the court will execute the trust, though only the shadow remains.² Is it, then, reasonable, if the *intent was clear* and no trustee happened to be named, that a different conclusion should be reached? Truly, as Justice Wilmot says, "that would be too fine a thread to hang this matter upon."³ But there are distinct authorities both before and after the statutes of Elizabeth in favor of holding the heir as trustee. Nothing can be more decisive than Symond's case before noticed. The following cases, after the statute, have been noted: A testator had appointed that lands and goods should be sold for charitable uses, but did not say by whom the sale should be made: the sale was decreed.⁴ This took place under the *first* statute. The result after the statute was precisely the same as that in Symond's case before. So where a devise was made to a curate.

¹ *Moggridge vs. Thackwell*, p. 88.

² The cases are collected in *Hill on Trustees*, 451.

³ *Wilmot's Opinions*, p. 28.

⁴ *Steward vs. Germyn*, 41 *Eliz.*, Duke, 79, case 22.

and to all that should serve the cure after him, though the curate was not able to take by devise, for want of being incorporate, and having succession, yet the Lord Chancellor (Nottingham) decreed that the heir of the devisor should be seised in trust for the curate for the time being.¹ Other cases have been cited of a similar nature. As soon as the trust was established, the court could regulate the charity and appoint new trustees from time to time, decreeing new conveyances.²

When the charity is purely indefinite, such as the poor at large, and no trustee is interposed, it can only be enforced by the exercise of prerogative power. Upon whatever theory the English monarch delegates this power to the chancellor, it clearly could not be adopted under our system of jurisprudence. The function of the courts is to ascertain the meaning of the testator by well-settled rules of interpretation. When the intention cannot be learned in this manner, their duty is at an end; conjecture is not to take the place of science. When interpretation ends, prerogative begins; but this authority is not to be assumed by the courts. Similar reasons would cause us to discard that peculiar *cy pres* doctrine by which funds given in support of a charity, in case that it is illegal or impracticable, are *perverted* from the design of the founder, under pretence of observing his general intention. Though this was the rule at common law, the "general intention" of the testator is not, as a matter of principle, the subject of judicial cognisance. But no difficulties, growing out of a want of corporate capacity or of the want of a technical trustee, should stand in the way of effectuating the well-ascertained intention of the donor. When the charity is *altogether* indefinite, it is not enforced even in England.³

(TO BE CONCLUDED IN THE NEXT NUMBER.)

¹ 2 Ventris, 849. In Chancery.

² Hill on Trustees, *passim*.

³ The cases of this kind are collected in 18 Beavan, 89, 90, 91.

*In the Massachusetts Supreme Judicial Court—January Term,
A. D. 1861.*

WHITMORE vs. SOUTH BOSTON IRON COMPANY.

1. Where a contract is made by written correspondence solely, it must be treated as a contract in writing, not subject to addition or alteration by proof of the acts, declarations, and intentions of the parties aliunde.
2. But it is competent to show that the parties, subsequent to entering into the same, consented to waive any of its provisions, and to substitute others in their stead.
3. But an additional warranty, not expressed, or implied by its terms, that the article sold is fit for a particular use, cannot be added, either by implication of law or parol proof.
4. Nor can the question whether such warranty is fairly to be inferred, from the application of the terms of the written contract to its subject-matter, or from the attending circumstances, be submitted to the jury; they should be instructed that no such warranty exists in the case.
5. A contract to manufacture "retorts like the one before furnished" imports more than likeness in "size, shape, and exterior form." It has reference to the material and workmanship.
6. Such a contract cannot be controlled by proving a custom in the vicinity of the transaction, that founders shall not be held to warrant their manufacture, unless by express contract; or, in case of apparent defects, and the absence of any express agreement, that they shall have their castings returned in a reasonable time, and the right to replace them by new ones.
7. The rule of damages for not furnishing manufactured articles according to contract is the difference in value between those actually furnished, and such as should have been, unless they were to have been furnished for a particular use.

Contract.—The declaration alleged that the plaintiffs were formerly partners with William T. Hawes, now deceased, and engaged with him in the manufacture of coal oil at East Boston; that, in the early part of 1858, the plaintiffs and Hawes employed the defendants to manufacture for them eighteen iron retorts, to be used at their works in East Boston, for the purpose of extracting oil from coal, for the price of \$100 each, and the retorts were manufactured, and the price was paid; that subsequently the retorts were set, and, when applied to use, proved defective and imperfect in their construction, and began to crack and leak, caus

ing not only the loss of the retorts themselves, but a loss of labor and fuel, an interruption of business, and the expense of removing the retorts and replacing them with others. The other facts in the case sufficiently appear by the opinion of the court.

A. A. Ranney, for defendants.

J. G. Abbott and *G. H. Preston*, for plaintiffs.

The opinion of the Court was delivered by

CHAPMAN, J.—The court are of opinion that the rulings of the trial were erroneous in several important particulars.

1. The contract between the parties was made in writing, and is contained in the letter of the defendants to Hawes, and his reply. As soon as the defendants assented to the modifications stated in the reply, the contract was complete. In construing the contract, the Judge ruled that the words, "like the one furnished you in February," did not apply to quality, but only to shape, exterior form, &c. But the Court are of opinion that this is too restricted a construction of these words. They do not apply to weight, because the weight is expressly designated; but they apply to the material; and this should not only be iron, but the same kind of iron that was used in the sample referred to; and they also apply to the quality of the workmanship, which should be like that referred to. The language implies that the iron shall be merchantable of its kind: *Gardiner vs. Gray*, 4 Camp. 144; *Shepherd vs. Pybus*, 3 Man. & Gr. 868; Chit. Con. 8th Amer. Ed., 450. But it does not imply that the retorts shall be fit for the particular use alleged in the declaration. It is only when a party undertakes to supply an article for a particular use, that he is held to warrant that it shall be fit and proper for that purpose: Chit. Con. 450, and cases there cited; *Brown vs. Edgington*, 2 Man. & Gr. 279; *Dutton vs. Gerrish*, 9 Cush. 89. When the contract is in writing, an additional warranty, not expressed or implied by its terms, that the article is fit for a particular use, cannot be added either by implication of law or by parol proof: *Chanter vs. Hopkins*, 4 M. & W. 899. The general doctrine, that parol evidence is inadmissible to

vary or add to a written contract, would exclude the parol proof; and the ordinary doctrine of construing contracts by adopting the fair import of the language which the parties have used would exclude such warranty by implication of law. Some of the cases cited are also authorities on this point. The question whether there was such warranty should not have been submitted to the jury; but they should have been instructed that the contract of the parties did not contain such warranty.

2. The instructions given to the jury as to the directions given by Messrs. Hawes & Gessner were incorrect. The reply of Hawes to the defendants' proposal directed the making of the retorts "as per memorandum and terms in yours of March 29, and directions given by myself and Henry Gessner." Such reasonable directions as he and Gessner might choose to give would come within this clause, and be binding on the plaintiffs. The plaintiffs allege, as one of their grounds of complaint, that the retorts were cast horizontally, and in green sand. They offered evidence tending to show that the retorts were thus cast; that this method of casting is unusual and improper; that a horizontal casting is much more liable to cold-shuts, blow-holes, shrink-holes, and other defects; and that, in a green sand casting, the liability to blow-holes and shrink-holes is much greater than in a dry sand casting. In reply to this, the defendants offered evidence tending to show that, when applied to by Hawes & Gessner, they told them, and that it was understood mutually, that, if they made them, they should have to cast them horizontally, as they could not get the necessary fixtures to cast them vertically in season; that they began to cast them, and had cast a number horizontally in dry sand, when Hawes & Gessner desired them faster, and were told by the defendants that they could not get them out faster, unless they cast them in green sand, and if so cast they would be more likely to contain blow-holes, shrink-holes, &c., and thereupon they ordered the defendants to cast them in green sand, as they must have them; that seven were cast in green sand, and horizontally—accordingly, it being impossible to cast them vertically in green sand; that all those cast were cast horizontally, and some of them in presence of Hawes and

Gessner, one or both of them, without objection; that they furnished a plan specifying the dimensions and shape and thickness of the retorts, which was followed by the defendants, as they claimed, and that the said Gessner examined the retorts.

If casting the retorts horizontally was an unusual and improper method, such casting would not be a compliance with the contract; and no conversation which was had prior to the making of the contract would be admissible to vary the writing. The casting in green sand was also in violation of the written contract, which provides that the casting shall be in dry sand. But Hawes & Gessner might waive a compliance with their obligation to cast the retorts according to the agreements of the contract; and if, because they were in haste to get the work completed, or for any other reason satisfactory to them, they did waive their rights in this respect, and consent that the retorts should be cast horizontally, and in green sand, the plaintiffs are bound by such waiver and consent. The amount of their knowledge as to the quality of iron, and as to how much better vertical casting is than horizontal casting, or dry sand casting than green sand casting, is immaterial; and the instructions on this subject were erroneous. The only question which was material is, whether they or either of them did, in fact, direct or give consent to the use of the green sand, and the method of casting horizontally, as adopted by the defendants.

8. The evidence offered to show that there was in Boston and its vicinity a custom, that founders should not be held, in the absence of an express agreement, to warrant their castings against any latent defects; also, that there was a custom that they should, in case of apparent defects, and in the absence of any express agreement, be entitled to have the castings returned in a reasonable time, and a right to replace them with new ones, was properly rejected. It would be difficult to state a principle which would reconcile all the numerous decisions that have been made on the subject of local customs or usages. STORY, J., in the *Schooner Recside*, 2 Sumn. 569, says: "I rejoice to find that of late years, the courts of law, both in England and in America, have been disposed to narrow the limits of the operation of such usages and

customs, and to discontinue any further extension of them." In the present case, the usage cannot be considered as forming a part of the contract.

If the claim of the plaintiffs is found merely in an implied warranty that the retorts should be fit for the particular use alleged, the court are of opinion that the action cannot be maintained. If it is to be further prosecuted on the ground that the contract, as interpreted by the court, has been broken, then the rule of damages, if the action is maintained, will be the difference in value between the retorts actually furnished and such retorts as should have been furnished. This is the rule when goods are not furnished for any particular use. *Bartlett vs. Blanchard*, 13 Gray, 429.

Exceptions sustained.

This case is reported in the forthcoming volume of Mr. Allen's Reports. We have given a somewhat more extended head note to the case than that furnished by the reporter, with a view to bring out, more prominently, the important points decided by the Court. And to enable the profession to obtain a more extended and comprehensive knowledge of the present state of the law upon the questions disposed of in the judgment, we have been at the pains to bring together, in a brief note, the leading cases upon the several points determined.

I. In regard to contracts made by way of correspondence, there can be no question they are to be treated as contracts in writing, the same as if the parties had reduced them to writing when both were present. But the precise time at which the contract thus entered into becomes binding upon the parties, has been a great deal discussed. Mr. Justice Chapman here assumes, that "as soon as the defendants assented to the modifications stated in the reply, the contract was completed," and we believe the assumption is well founded. But no question in the

law of contracts has been more strenuously debated, both by the Courts, and by elementary writers, than this; and since the discovery of the electric telegraph, there is liable to come in an element of revoking a written offer, which before did not exist. An offer made in absolute terms, and dispatched by post, is considered as irrevocable. If accepted unconditionally, upon its arrival, and immediate notice of such acceptance dispatched by post, in return, before any notice of the recall of the offer reached the person to whom it was sent, notwithstanding, in the mean time, the party making the offer had changed his mind, and had dispatched by post, a letter of recall, which was received in due course of mail, but not until after the letter of acceptance had been sent. *Adams vs. Lindsell*, 1 B. & Ald. 681; *Dunlop vs. Higgins*, 1 Ho. Lds. Cas. 381; *Duncan vs. Topham*, 8 C. B. 225. This is now the settled rule of the English law.

There are many cases in the books which have attempted to maintain a different rule, but they have not been satisfactory to the profession, or to the common

sense of justice; and have, therefore, not been followed. The case of *Cooke vs. Oxley*, 3 T. R. 653, where it was held, that an offer agreed to be good, if accepted by a given time, was held not binding, has been a good deal discussed, but has never been well received. And the case of *McCulloch vs. The Eagle Insurance Co.*, 1 Pick. R. 277, wherein it is held, that the absolute acceptance of an unqualified offer to insure at a rate of premium specified in the offer, is rendered of no binding effect, by the company having dispatched a countermand of their offer before its acceptance, although not received, until afterwards, by the plaintiff, has never been regarded as sound law. Such a view implies, as stated by Mr. Justice Metcalf, in his well known and universally admired Essay upon the Law of Contracts, 20 American Jurist, 18, 19, 20, 21, 22, that no contract ever could become binding, if attempted to be made by way of correspondence.

The infirmity of all this *argument* and *attempt* at reasoning, against the common sense instincts and innate sense of justice of every sound mind, is illustrated by Parker, Ch. J., in *McCulloch vs. The Eagle Insurance Co.*, 1 Pick. R. 281, by supposing the letter, on either side, had been recalled before its arrival, *by ay express* outrunning the post, from which the learned Judge concludes it must be very obvious the letter must become of no avail, as it clearly would. And so it has very justly been held, in regard to an offer recalled, before its arrival, by a counter telegram. *Bank of the Republic vs. Baxter*, 81 Vt. R. 101. But the learned Judge does not seem to have here comprehended, that unless the offer is countermanded *before its arrival and acceptance*, it becomes binding as a contract, since by its acceptance, in the manner and time contemplated by its author, the minds of the parties thus meet,

and the contract, by its terms, becomes consummated, and any other construction is virtual bad faith. The cases are very numerous which adopt this view, and will be found carefully digested in Perkin's Ed. Chit. on Cont. 8, 9, 10, 11, 12. See also *Averill vs. Hedge*, 12 Conn. R. 424; *Redfield on Railw.* 78, 98, 9; *Maotier vs. Frith*, 6 Wendell, 116; *Hamilton vs. Locoming Ins. Co.*, 5 Barr, 339; 2 Kent. Comm. 477; *Taylor vs. Merchants' Ins. Co.*, 9 How. R. 390, which last case is directly opposed to 1 Pick. R. 277.

II. In regard to the point that articles contracted to be furnished for a particular use, must be suited for that use, it is now perfectly well settled, although for a long time somewhat questioned, that there is an implied warranty to that effect. The authorities are very extensively collated by Bennett, J., in *Brown vs. Sayles*, 27 Vt. R. 227-232; *Howard vs. Hoey*, 28 Wendell, 350; *Gallagher vs. Waring*, 9 Wend. R. 20; *Chitty on Com.* 475, and cases cited.

III. The rule of law in regard to the precise effect of the local usages and customs of trade and business, in giving the proper construction to the terms of a written contract, is extremely indefinite. But the view presented by the case to which this note is attached, is, perhaps, liable to some misconstruction. No reason is given why the usage offered to be proved in this case is not properly receivable; and the only case cited, and that with marked approbation, is *The Schooner Reeside*, 2 Sumner, 562, where Mr. Justice Story approves, what he calls the tendency of modern decisions to restrict the application of the rule within the narrowest limits. One might fairly infer from this, almost, that the Court did not regard this class of evidence with any degree of favor. But the Court clearly did not so intend. There is no other source from which the Courts

derive so much aid in the construction of contracts, since the meaning of all language is made out, mainly, from the implications growing out of the innumerable and wholly undefinable additions, which all minds naturally and necessarily make to the mere words in which a contract or a conversation is expressed. The chief difference between a terse, clear, and forcible style of speaking or writing, and one that is complex, diffuse, and feeble, consists chiefly in so arranging the elipsis, as that all minds cannot fail to supply it readily, and always in the same manner. This can only be done by the aid of a thorough knowledge of the customs and usages of the language, of the place, and of the particular business. In regard to most of these there will be no controversy, since they are known to all, and seem natural and familiar, and right. But when we are offered proof of one which is new and improbable, and which, therefore, seems unreasonable, we instinctively resist it. But this resistance may be more the result of ignorance in the Courts, than of any clearly defined principle. We mean, of course, ignorance in regard to the customs of a particular business. For instance, most inexperienced judges, upon being told by a railway engineer that when he came so near a herd of cattle upon the track, that there was no chance to stop the train before reaching them, or to have them get off the track, he felt it his duty to crowd steam to the utmost capacity of his machinery, would be shocked at the audacity and temerity of such a man, and of such a witness. But this feeling would wholly disappear, upon learning that this was the only hopeful course to preserve the lives of the passengers. A thousand similar illustrations in regard to the course, the usages, and the laws of business, in reference to contracts, might be adduced.

A custom or usage which is unreasonable or in contradiction of the express terms of the written contract, or which is only occasional and not universal in the place and time, will have no effect, is entirely well settled: *Burton vs. Blin*, 23 Vt. R. 151; *Clarke vs. Roystone*, 18 M. & W. 752; *Roberts vs. Barker*, 1 Cr. & M. 808; *Boraston vs. Green*, 16 East, 71. And even where the terms of a written contract, by fair implication, seem to exclude the operation of a usage or custom, it can have no operation: *Webb vs. Plummer*, 2 B. & Ald. 746. And this is nothing more than the fair application of the rule, that written contracts cannot be controlled, or varied by parol evidence. Proof of usage in particular trades has been received to show the secondary meaning of terms, when it is obvious the terms could not have been used in their primary sense, but not otherwise, the Courts feeling bound to give language its natural signification in the construction of contracts, unless that will lead to absurd consequences. This is unquestionably opening a wide field for the discretion of Courts in regard to the effect of such usages, but it is now universally adopted in regard to the construction of wills, and other written instruments, as far as we know: *Wigram on Extrinsic Evidence*, Prop. iii. p. 42, and cases cited; *Chitty on Cont.* 104 et seq.; *Redfield on Railw.* 52, 53, and cases cited, and especially the opinion of Lord Denman, in *Humfrey vs. Dale*, 7 Ellis & Bl. 266. From the opinion of the learned judge here, and from the whole course of modern decisions, it is obvious the tendency is to receive evidence of usage and custom, both local and general, instead of being narrowed. is now admitted with more freedom than the earlier cases would seem to justify.

We admit that this practice, in inexperienced and rash hands, is liable to

become a dangerous instrument, and one quite susceptible of abuse. But that is no reason why it should be discounted. There is no good thing which is not liable to abuse, and often the more liable, in proportion to its value. But this should not induce us to relinquish it, but rather to study more carefully to guard against its abuse. The most unfortunate thing in regard to this, as in regard to all others, is, that men's confidence in themselves is quite liable to be in the inverse ratio of the confidence of others in them, so that precisely these men who require most sedulously to be hedged in against committing high-handed wrong and abuse, are those whom it is the most difficult to restrain. Thus it often happens that the class of men with whom an extended discretion is least safely to be trusted, are the very men most ambitious of assuming such an irresponsible discretion; and on the other hand, those most capable of its exercise are the least ready to assume it. So in regard to judicial discretion in the application of customary law, those judges who feel the most entitled to confidence commonly

deserve the least. And while it is said *boni judicis ampliare jurisdictionem*, the fact of seeking to enlarge one's jurisdiction is more common with bad judges than with good ones. But the one does it to secure justice, and the other to gratify his own conceit, and sometimes to disappoint the expectations of others; for personal conceit and vindictiveness commonly go together.

But with all this ground of argument so justly open against the introduction of usage or custom in the exposition of written contracts, and all contracts, the rule is nevertheless a wise one, and one which will be likely to widen as time advances. The great wisdom and the great difficulty will always be found in defining the exceptions, which will be liable to be sometimes unjustly multiplied to suit the tastes of particular men, and as often unjustly narrowed to meet the supposed exigency of particular cases. But this results from the baseness and the infirmities of human nature, and which no human forecast can prevent or effectually restrain.

I. F. R.

In the Superior Court of the City of New York.

SAMUEL CARPENTER vs. THE SIXTH AVENUE RAILROAD COMPANY.¹

1. A collusive settlement of an action, by the parties, to deprive an attorney of his costs, made after a notice from the attorney, of his claim, to the defendant, will not be allowed to prejudice the attorney's right to enforce payment of his taxable costs.
2. His claim for taxable costs will be protected against a collusive settlement in an action upon a *tort* merely *personal*, as well as in an action upon contract; and as well against a settlement made before trial as after judgment.
3. But an attorney, by an agreement between him and his client, that, besides taxable costs, he shall receive as a compensation for his services a sum equal to

¹ We are indebted for this case, together with the reporter's note and statement of facts, to Chief Justice Bosworth, for which he will please accept our thanks.—*Rds. Am. Law Register.*

one-third of the sum recovered, will not acquire any right in the *subject-matter* of such an action, or control over it, which will affect the power of the plaintiff to settle and release the *claim for damages* before a trial has been had.

4. The reported cases in regard to an attorney's *lien*, or right to be compensated for his costs, classified and considered.

Before BOSWORTH, C. J., and ROBERTSON and MONCRIEF, Js.
Heard Feb. 15. Decided March 29, 1862.

Appeal by *L. E. Bulkeley*, the plaintiff's attorney, from an order.

The plaintiff was injured on the 21st of September, 1860, by a collision with one of defendant's cars. About the first of October 1860, it was agreed between the plaintiff and Mr. Bulkeley, by a written and sealed agreement signed by the plaintiff, that Mr. Bulkeley should bring a suit to recover damages for the alleged injury; that he should be paid a retaining fee of \$75; and, as said agreement further states, "he is also to receive from me, (the plaintiff,) and is empowered to retain out of any moneys received a sum equal to one-third of the amount recovered or received on account of such claim, besides the taxable costs of suit, for which he is to conduct said suit, or compromise, to its termination; but his fee to be at least \$500, unless nothing is received from the claim." The agreement having been executed, this action was commenced by Mr. Bulkeley, as plaintiff's attorney; and on the 11th of March, 1861, he served on the defendant a written notice, signed by him, which states that I (the attorney) "give you notice that, by virtue of a special instrument in writing, executed by the plaintiff in this action, I hold a lien upon this suit, for costs, counsel fees, moneys advanced, &c., to the amount of \$500 and upwards, and that no payment, settlement, or compromise, in any matter relating to this suit, or the claims on which it is founded, will be valid or binding, except made through me personally, or on my written order."

On the 9th of May, 1861, after the cause had been noticed for trial, and was about being reached, the plaintiff and defendant settled the action, and for the sum of \$150 the plaintiff executed to the defendant a full release. The defendant then applied to plain-

tiff's attorney to sign a consent that an order of discontinuance be entered, and that being refused, moved on an affidavit of the settlement, and on the release, for leave to enter such an order. The moving affidavits did not allege that there was no motive or intent, in settling, to deprive the attorney of his costs. The motion was opposed, on affidavits stating the agreement before mentioned, the notice to defendant not to settle, and the services rendered. The Court ordered a reference to a referee, to ascertain and report "what, if anything, in addition to the taxable costs, would be a reasonable compensation to the attorney for the plaintiff, for his services in this action from the time of his retainer to the 21st of May, 1861." The referee reported the sum of \$600. On that report, and the affidavits previously mentioned, the motion was heard, and an order was made on the 19th of October, 1861, confirming said report, and granting leave to the defendant to enter an order of discontinuance, without costs to either party as against the other. From that order the attorney of the plaintiff appealed to the General Term.

L. E. Bulkeley, appellant, in person.

John Slosson, for respondent; the defendant.

The opinion of the Court was delivered by

BOSWORTH, C. J.—In the following cases, the settlement between the parties was made *after judgment*, and after the prevailing party had given notice of his claim to the costs, as attorney of the party recovering the judgment, and had forbidden a settlement except upon the terms of paying to him the amount of his costs. *Martin vs. Hawks*, 15 J. R. 405; *Power vs. Kent*, 1 Cow. 172; *Haight vs. Holcomb*, 16 How. Pr. R. 160, S. C., *Id.* 173; *Ward vs. Syme*, 9 H., *Id.* 16; *Sherwood vs. The Buffalo & N. Y. City R. R.*, 12 How. 136; *Rooney vs. The Second Avenue R. R. Co.*, 18 N. Y. R. 368.

It was determined, in these cases, that the recovery of the judgment, and notice by the attorney recovering it, to the adverse party, to pay the costs to him, gave him a lien on the judgment, or constituted him an equitable assignee of it to the extent of his

costs, and the attorney was protected against the settlement subsequently made.

In the following cases, a settlement, *after judgment*, between the parties, was upheld, the attorney not having given any notice not to pay to his client, and there being no collusion to defraud him established. *Pinder vs. Morris*, 3 Caines R. 165; *The People vs. Hardenbergh*, 8 J. R. 335; *Graves vs. Eades*, 5 Taunton 429; *Matt vs. Smith*, 4 B. & Ald. 466; *Welsh vs. Hole*, 1 Doug. 238.

The cases last cited establish the doctrine, that an attorney recovering a judgment, has not, merely by reason thereof, a lien on the judgment, which interferes with the right of the parties to make, *bona fide*, any settlement which they may deem expedient. That it is necessary for the attorney to notify the defeated party not to pay the costs to his client, to perfect a right to use the judgment to enforce payment of them; and that until such a notice is given, his client may receive payment or discharge the judgment, when this is done without any collusion between the parties to defraud the attorney of his costs.

It being established law that the parties, even after judgment recovered, may settle it and discharge it, and that the settlement will be upheld as against the attorney's claim for costs, in a case free from collusion to defraud him, and where he has omitted to give notice not to settle without paying to him his costs, it needs no authority to show that a settlement, under similar circumstances, can be made before trial, and the attorney left to look to his client alone for his compensation. This is as far as the court went in *McDowell vs. The Second Av. R. R. Co.*, 4 Bosw. 670-679. In that case, no notice had been given by the plaintiff's attorney, and no intent to defraud the plaintiff's attorney was established, and the settlement was held to be conclusive against the attorney's claim for his costs.

There are numerous cases reported where the attorney sought to proceed in the action to recover his costs, after the parties had settled without his intervention, and where he was held concluded by it, although there were circumstances of suspicion tending to show a case of collusion. The language of the cases is, that he must

make out a *clear case of collusion*, to justify him in proceeding in the action, after notice of a settlement of it by the parties: *Nelson vs. Wilson*, 6 Bing. 568; *Clarke vs. Smith*, 6 Man. & Gran. 1051. and *Francis, a Pauper, vs. Webb*, 7 Com. Bench, 731, illustrate this proposition. See also *Goodrich vs. New*, 18 How. Pr. R. 189; and *Owen vs. Mason*, Id. 156.

In *Tovey vs. Payne*, 1 B. & Ad. 660, the defendant compromised with the plaintiff *after notice* from the plaintiff's attorney not to do so without his consent. The action was for an excessive distress, and the plaintiff, in support of a rule that the defendants show cause why they should not pay to the attorney his costs, cited *Welsh vs. Hole*, Dougl. 238; *Read vs. Dupper*, 6 T. R. 361; *Swaine vs. Senate*, 2 N. R. 99; and *Chapman vs. How*, 1 Taunt. 841. The rule was obtained on the grounds, first, that the defendant procured the plaintiff to give a release by surprise and misrepresentation; and, second, that he had no right by compromising the action, to deprive the plaintiff's attorney of his lien for costs.

The court said, "there was no surprise or misrepresentation in this case; and the case is to be distinguished from those cited, *as being an action for damages purely unliquidated*," and discharged the rule. If a notice by the attorney of a plaintiff to a defendant, not to settle or compromise an action without his consent, deprives the defendant in all cases of the power of settling it, except upon the terms of paying the attorney's costs, then *Tovey vs. Payne* was decided erroneously; the court, in its decision, assumed there was a distinction, in regard to the attorney's lien, between an action for damages purely unliquidated, and the actions in the cases cited in *Tovey vs. Payne*, 1 B. & Ad. 660. The following brief statement shows the character of the cases cited in *Tovey vs. Payne, supra*, and was actually decided:

In *Welsh vs. Hole*, 1 Douglas 238, the compromise between the parties and the release of the defendant was, *after judgment* recovered, and after defendant had lain in jail two years. The plaintiff's attorney moved for a rule that the defendant pay his costs. The motion was denied; the attorney had not given any notice to the defendant not to settle with the plaintiff.

Read vs. Dupper, 6 T. R. 361, was an action on contract, and the master, on a reference to him, *awarded a certain sum to be paid to the plaintiff, together with costs*. The plaintiff threatened to take the defendant in execution, and the latter paid the debt and costs to the former, after notice from the plaintiff's attorneys not to pay to the plaintiff himself, because their bill was not satisfied. The defendant was ordered to pay to the attorneys their costs. In *Swain vs. Senate*, 5 Bos. & Puller 99, an action on contract, the defendant's bail settled with the plaintiff, the defendant being at the time in prison, and the court allowed the attorney of the plaintiff to proceed by *scire facias* against the bail, to collect his costs, on the ground that the settlement was made to deprive the attorney of his costs; the attorney had not given any notice not to settle.

In *Chapman vs. How*, 1 Taunton 341, the attorney proceeded to judgment in the cause, after the parties had settled, and after being notified of the fact of the settlement. The settlement was made on the 24th of May, after interlocutory judgment and notice that a writ of inquiry would be executed on the 27th of May. The attorney had not given any notice of his lien, and there was no intent to defraud him proved. The judgment and execution were set aside, and a return of the money levied was ordered.

In this connection, reference may be made to the cases of *Cole vs. Bennett*, and *Barker vs. St. Quintin*, *infra*.

In *Cole vs. Bennett*, 6 Price 15, the plaintiff's attorney proceeded to judgment and execution, after a settlement had been made by the parties; his proceedings being regular, were sustained, the court holding, on the facts presented by the affidavits, that the settlement was *collusive*.

Barker vs. St. Quintin, 12 Mees. & Wels. 441, merely decides that if a sheriff execute a *ca. sa.* after the judgment is released and the plaintiff notifies him not to execute it, he is a trespasser: that, although the release was given in pursuance of collusion between the parties to deprive the attorney of his lien, the sheriff cannot, even under such circumstances, execute the *ca. sa.* at the instance of the attorney, to enable the latter to enforce payment

of his costs. That if the attorney is, in any way, to obtain the fruits of that judgment, it must be by an application to the equitable jurisdiction of the court. The sheriff is treated as the mere agent of the plaintiff, and if he orders the sheriff not to arrest a party at his suit, he is a trespasser if he subsequently makes the arrest.

This brief review of the cases cited in *Tovery vs. Payne*, shows that there is the distinction between them and that case, on which the court assumed to act in deciding the latter, and on account of which it refused relief to the attorney, notwithstanding the settlement was made after notice from the attorney forbidding it. But it is the only case within our observation, in which protection of the attorney has been refused on the ground on which the court there placed its decision.

The late Supreme Court acted on this distinction, or on an analogous principle, in *The People vs. Tioga C. P.*, 19 Wend. 73: the court held that a *chose* in action for a *tort* merely *personal*, is not assignable so that a court of law will protect the assignee against the fraudulent discharge of the damages recovered in a suit prosecuted for such tort, although the tort-feazor accept the discharge with full knowledge of the assignment. From the report of that case, it would seem that judgment had been entered. See also 4 Duer 74. If this case is correctly decided, it is difficult to understand how the attorney in the case before us acquired any lien upon the plaintiff's *claim for damages*, although he may be entitled to protection to the extent of his taxable costs. If an absolute assignment of the cause of action for value to a third person, would not confer any rights in respect to it which a court will protect, the attorney would not seem to be in any better condition in respect to the plaintiff's *claim for damages*, or capable of acquiring a more indefeasible interest in it.

There is another and a stronger ground for rejecting the attorney's claim to such a right or property in the *chose* in action on which the suit is brought, that no settlement of the suit can be made except with him, and on payment to him of the moneys

agreed to be paid to effect the settlement, and by way of satisfaction for the damages claimed.

To give such an effect to the agreement between him and his client, would be to treat him as a purchaser of the whole cause of action, if the recovery should not exceed \$500; or of such interest in it as will equal the amount of his agreed compensation, if the recovery should exceed \$500; and he would be so treated, although purchasing with a view to bring a suit upon the cause of action, thus purchased wholly or in part.

The transaction thus viewed and construed, would be contrary to *public policy*, as well as in violation of a statute of the State, 3 R. S. 478, § 58, [Sec. 71.] 5th edit.

An attorney or solicitor is not permitted to contract with his client, previous to the *termination of the suit*, for a part of the subject-matter of the litigation, as a compensation for his services. *Merritt vs. Lambert*, 10 Paige 352, 358, and 2 Denio 607; *Simpson vs. Lamb*, 7 Ellis & Black. 84, 92-3.

But, by the agreement between the plaintiff and his attorney in this case, the latter did not contract, in terms, for an interest in, or ownership of a part of the subject-matter of the litigation. It was thereby agreed that the attorney should receive from the plaintiff, and might "retain out of any moneys received, a *sum equal* to one-third of the amount recovered or received * * besides the taxable costs of suit * *; his fee to be at least \$500, unless nothing is received from the claim."

His rights, as against the defendant, cannot be stronger than if he had contracted with his client for a third part of the entire recovery, or for the whole of it, if it did not exceed \$500. He cannot by indirection acquire rights as against the defendant, or a control over the subject-matter of the litigation, which an express contract, stipulating for a like benefit and interest, would not confer.

Our conclusion is, that the attorney in this case should be protected for such amount of costs as would be taxable up to the time of the settlement, in case a recovery for over \$50 had been then had, but that he has no rights which a court will protect in the

plaintiff's claim for damages. The plaintiff had full power over the suit before trial, to settle the *damages* on such terms as he saw fit; although if the settlement had been made *after judgment*, and with a view to deprive the attorney of his costs and stipulated compensation, he might, perhaps, be protected for the whole amount of the agreed compensation, if the judgment was for a sum which would cover it. *Rooney vs. Second Avenue Railroad Company*, 18 N. Y. R. 368.

We think it is clearly established, that the settlement in this case was collusive. It is clear, so far as the plaintiff is personally concerned, that he settled the suit with the view of cheating his attorney. The defendants settled, after a notice to them of the attorney's claim, forbidding a settlement with, or payment of anything to the party. What they agreed to pay and paid, they paid in disregard of this notice, and no one on behalf of the defendants testifies that it was not one of the objects of the settlement to get rid of paying costs which the attorney, as between himself and his client, had earned, and which it was anticipated he would collect from the defendants, as a matter of course, if the cause proceeded to trial.

The attorney's services in a meritorious action, though for a *tort* merely personal, are as justly entitled to protection against fraudulent settlements by the parties, as if rendered in an action to recover the price of a chattel, or damages for converting it.

And we are not satisfied, that if the attorney of record for Thomas, in the suit of *The People vs. Tioga Com. Pleas*, (*supra*), had notified the defendant not to settle, except upon the terms of paying the costs to him, that a collusive settlement, like the one in that case, would have been permitted to defeat the attorney's claim for costs. We do not, therefore, follow the case of *Tovey vs. Payne*, (*supra*), not being satisfied that an attorney is not as much entitled to protection against collusive settlements in actions for unliquidated, as in those for liquidated damages.

We think the order appealed from should be reversed and the order of discontinuance, (if one has been entered,) be vacated; but with liberty to the defendants to re-enter an order of discon-

tinuance on paying the taxable costs of the plaintiff's attorney up to the time he had notice of the settlement of the action, on the adjustment thereof, by the Clerk, on two days' notice to the defendants, together with \$10 costs of opposing the motion made at special term, the referees' fees on the reference ordered, and \$10 costs of this appeal.

This disposition of the matter will protect the attorney against a collusive settlement, to the utmost extent sanctioned by any adjudged case. It saves to him the costs, taxable in favor of a prevailing party against the adverse party, and protects the attorney's right to them, against a collusive settlement, whether made before trial or after judgment. The authorities support his claim to this extent and no further.

It enforces the rule that a cause of action for a tort, merely personal, is not assignable, and the more important rule, that an attorney cannot be permitted to acquire, by contract made with his client *pendente lite*, or before suit brought, and with a view to bringing the suit, an interest in the subject-matter of the litigation, which the Court will protect against a settlement by the parties themselves made before trial.

The order appealed from must be reversed, and the order of discontinuance (if one has been entered) be vacated, but with liberty to enter an order of discontinuance on the terms above stated.

Ordered accordingly.

The lien of the attorney may be regarded under two aspects; I. General, II. Specific.

I. The general lien of the attorney extends to all papers which he holds in a professional capacity. Like other liens, it depends upon possession of some instrument belonging to the client, or of a sum of money, or other property to which he is entitled. Thus he has no lien on a fund in Court, decreed to his client, beyond his costs in the particular suit; he cannot claim from such fund the amount of other costs due to him in other suits.

Lann vs. Church, 5 Maddock, 391; Boston vs. Bolland, 4 M. & C. 353. As Lord Cottenham, in the last case, expresses it; "the lien upon the fund realized in the suit is confined to the costs of that suit. This is a lien which the solicitor is entitled actively to enforce; the right to retain a client's papers till a bill is paid, is of a nature totally different. It applies to all his bills of costs, but he *cannot actively enforce* it. It is merely a right to retain." *Id.* If he refuses to act for the client, it is of little, if any value; Helsop vs. Metcalf, 3 M

& C. 188; *Caligrave vs. Manley*, 1 T. & Rusv. 400; *Cave vs. Martin*, 2 Beav. 584, 586; but if the client unreasonably cease to employ the solicitor, the latter need not afford any facilities to the client by the use of the papers; *Lord vs. Wormington*, Jacob, 580. In Pennsylvania, the attorney is deemed to have a right to defalcate or deduct rather than a lien; *Dubois' Appeal*, 88 Penn. (2 Wright) 231, (1861.) See *Pope vs. Armstrong*, 8 Smedes & Marshall, 214. The general lien of the attorney upon papers depends wholly upon the fact that they are in possession: *St. John vs. Diefendorff*, 12 Wend. 261. Accordingly it has been held that a creditor who has attached a judgment recovered in favor of the client has such a right as to prevail over the general lien of an attorney for the balance due him from his client; *Hought vs. Edwards*, 1 Hurlstone & Norman, 171. "The lien exists by reason of possession, and an attorney has no possession of a judgment," per Martin, B., 172.

The principal rules governing this lien appear to be the following:

1st. The claim must have arisen from professional employment; *Worrall vs. Johnson*, 2 Jac. & W. 218. In that case, it may be held for any general balance on account. Cases before cited; also, *Douglas*, 104, 105, 288; *Anon.* 12 Mod. 654; *Mitchell vs. Oldfield*, 4 T. R. 128; *Ex parte Nesbitt*, 2 Scho. & Lefroy, 279; 1 M. & S. 585. No motion can be successfully made under the summary process of the Court for a delivery of the papers until the entire balance be paid; *Dyer vs. Bowley*, cited in *Maugham on Attorneys*, 805.

2d. The lien is only commensurate with the right which the client, himself, has; *Hollis vs. Claridge*, 4 Taunt. 807; so if the property in the papers is in a third person, the attorney cannot detain

them for a debt due from the client; *Ex parte Bush*, 7 Vin. Ab. 74; *Furlong vs. Howard*, 2 Scho. & Lef. 115; *Ex parte Nesbitt*, 2 Id. 279; *Hoare vs. Parker*, 2 Term R. 876.

3d. If the papers be delivered for a specific purpose, no lien can be created beyond that purpose; as if deeds are delivered to the attorney, in order that he may exhibit them to another; *Balch vs. Symes*, 1 Turner, 192; or to enable the attorney to draw a mortgage: *Lawson vs. Dickinson*, 8 Modern R. 806. It would seem, however, that there must be some agreement or understanding, that they were delivered for the special purpose only, or else the lien will attach; *Ex parte Stirling*, 16 Ves. Jr. 258. It is certain that if, after the object for which they were given has failed, the attorney is permitted to retain them, there is a general lien. *Ex parte Pemberton*, 18 Ves. 282; 16 Id. 259.

4th. The lien is subject to the equitable right of set-off between the plaintiff and the defendant. 2 Kent's Com. 641; *St. John vs. Diefendorff*, 12 Wendell, 261. This topic will be more fully noticed hereafter.

5th. The lien may be waived when the attorney accepts security from his client. *Cowell vs. Simpson*, 16 Ves. Jr. 275.

II. *Specific Liens*.—The lien which the attorney has upon any papers of his client, for specific professional service, is of this class. The principles which govern the case are those prevailing in other instances of liens for services rendered. Like the lien of a mechanic, it depends upon possession, and confers no right in the property, but only a right to retain it until the claim is satisfied. It will not be necessary to describe it more fully. There is, however, another lien of a particular character, growing out of the right of an attorney to make a claim

the results, or the prospective results, of an action for his services and disbursements in that very action, which demands special notice.

1. *The nature of this lien.*—It is said by Baron Parke, (Lord Wensleydale,) "that the lien which an attorney is said to have on a judgment, (which is perhaps an incorrect expression,) is merely a claim to the equitable interference of the Court to have that judgment held as a security for the debt." *Barker vs. St. Quintin*, 12 M. & W. 440. This statement was adopted by the entire Court in *Hough vs. Edwards*, 1 H. & N. 171, (1856.) So that if the judgment was fraudulently and collusively released by the plaintiff with the intent to deprive the attorney of his lien, he cannot proceed to issue execution, but is driven to his motion. *Id.* Applying to this definition Lord Cottenham's distinction, in *Bozon vs. Bolland*, *supra*, between a general and specific lien, this result would be attained. A particular claim for costs, on the part of an attorney, furnishes a basis for an application for equitable relief. A general claim for costs permits no equitable relief, but the attorney must rely upon possession. The older authorities, however, hold that the attorney must be deemed an equitable assignee of the judgment so far as to protect his claim for costs in the action in which judgment was obtained. See also *Sherwood vs. Buffalo R. R. Co.*, 12 How. Pr. R. 186; *Haight vs. Holcomb*, 16 Id. 160, and cases cited. The recent English view appears more philosophical, and in accordance with general principles. See *Wright vs. Cobleigh*, 1 Foster, 339.

2. *When, and under what circumstances, the Court will actively interfere in the attorney's behalf.*

A. *After judgment.*—The first case which is usually said to have established

the right, is *Welsh vs. Hole*, 1 Douglas, 237, per Parke, B., 12 M. & W. 451. The right, however, would seem to have been acknowledged at an earlier period. See 1 Douglas, 105. In addition to the authorities cited in the principal case, are *Hart vs. Chapman*, 2 Aiken Vt. 162; *Foot vs. Tewkesberry*, 2 Vermont, 97; *Quimby vs. Quimby*, 6 N. H. 79; *Currier vs. Boston & Maine R. R.*, 37 N. H. 228. It is entirely clear that notice should be given to the defendant, by the attorney, that he shall insist upon his so-called lien; otherwise, a settlement made in good faith will be binding. *Welsh vs. Hole*, *supra*; *Read vs. Tupper*, 6 Term R. 361; *People vs. Hardenbergh*, 8 Johns. 259. It is not necessary, however, that the notice should be direct. Any information to which credit would ordinarily be given, will suffice. *Currier vs. Boston & Maine R. R.*, *supra*; *Lake vs. Ingham*, 8 Vermont, 158; *Young vs. Dearborn*, 7 Foster, 324; *Abel vs. Potts*, 8 Esp. Cas. 242. The application, by the attorney, to vacate the satisfaction of the judgment, should be made at an early period. A delay of two years was held to be too long. *Quimby vs. Quimby*, *supra*. The extent of the lien was originally the taxable costs; but in New York, since the code which allows the attorney to make an agreement with his client for compensation, the lien still exists, and is no longer measured by the costs. *Rooney vs. Second Avenue R. R. Co.*, 4 Smith, 368; *Ward vs. Syme*, 9 How. Pr. R. 16. In California an opposite view seems to be entertained. *Ex-parte Syle*, 1 Cal. 331; *Mansfield vs. Dorland*, 2 Id. 507. An attorney has the same lien upon an award as upon a judgment, especially where the cause still remains in Court or a judgment is entered upon the award. *Ormerod vs. Tate*, 1 East, 453. See also *Hutchinson vs. Howard*, 15 Vermont, 544.

The lien of an attorney does not extend to a case where he has recovered in equity, for his own client, land from a defendant. *Smally vs. Clark*, 22 Vermont, 598. The allowance of such a doctrine would establish an equitable lien or mortgage in opposition to general principles. S. C., overruling a dictum in *Barnesley vs. Powell*, Ambler R. 102. Nor can a married woman in those states where she cannot convey, without the concurrence of her husband, by *her own act*, bind her separate real estate to pay a solicitor for services or expenditures. *Cozzens vs. Whitney*, 8 Rh. Is. R. 79.

The lien of the attorney is not to be established against the pre-existing rights of third persons. *Walker vs. Sergeant*, 14 Vt. 247.

B. *Before judgment*.—As a general rule, the plaintiff must be regarded, during the progress of a suit, as having the control of it—as being *dominus litis*. Something like collusion must be shown in order to induce the Court to interfere. This principle has been held to be true even in the case of pauper plaintiffs. It was strongly urged to the Court that in these cases, as the attorney always looked to the result of the action for his recompense, a settlement without the attorney's knowledge must be collusive. It was held that this view could not be taken, and as no actual collusion was proved, the Court refused to set aside the release which had been given. *Jones vs. Bonner*, 2 Exch. 229; *Wright vs. Burrows*, 3 C. B. 348; *Francis vs. Webb*, 7 C. B. 731. In other cases it is still more clear. In *Jordan vs. Hunt*, 3 Dowl. P. C. 666, Parke, B., says: "It is quite competent to parties to settle actions behind the backs of the attorneys, for it is the client's action and not the attorney's. It must be shown *affirmatively* that the settlement was effected with the view of cheating the attorney of his costs."

Archbold's Practice, 8th ed., 1, 108; 1 *Broom's Practice*, 192; *Nelson vs. Wilson*, 6 Bingh. 568; *Clark vs. Smith*, 1 D. & L. 960; *Anon.*, 1 Dowl. P. C. 173. If positive collusion is not shown, notice to the defendant not to settle is, at all events, necessary to create the right on the part of the attorney. If a settlement be made subsequent to notice, it ought usually to be treated as made by collusion.

The later English decisions and authorities would seem to throw some doubt upon the distinction taken in *Ex parte Hart*, 1 B. & Ad. 660, or in respect to actions of tort for unliquidated damages. Thus *Jones vs. Bonner*, 2 Exch. 229, was an action of trespass, and it was remarked that the interference of the Court was a matter of discretion under the circumstances of each particular case. Mr. Cross, in his work on Liens, says, that a settlement in an action for unliquidated damages is valid, *unless there be actual fraud*, surprise, or *misrepresentation*, p. 280. Mr. Broom, however states the rule in the following language, "Where the action is for damages purely unliquidated, and there has been no surprise or misrepresentation in the case, the Court will not, *it seems*, interfere on behalf of the plaintiff's attorney, although notice has been given that a settlement must not be made." This shows that the case is not considered decisive. 1 *Broom's Practice*, 192. The case of *Ex parte Hart* is, however, cited with approbation in *Hutchison vs. Pettis*, 18 Vermont, 614. If Baron Parke's view of the nature of the (so called) attorney's lien is substantiated, many of the objections to enforcing it in this class of cases will be obviated. In each case the question must come before the Court, and in the exercise of a sound discretion that which is just may be done.

It is well settled that the Court will not *actively aid* a party to effectuate a

settlement, who has not acted in good faith towards the attorney. *Young vs. Dearborn*, 7 Foster, N. H. 324, and cases cited. The attorney of the *defendant* has no such interest in the suit as to prevent parties from compromising it without his consent. His right bears no resemblance to the lien of the plaintiff. *Quested vs. Collis*, 10 M. & W. 19.

A distinction of some importance has been recently taken in respect to the right of a client to transfer his interest to his attorney *pendente lite*. He cannot make an actual sale; *Simpson vs. Lamb*, 7 E. & B. 84; but he can assign his interest by way of security for services actually rendered. *Anderson vs. Radcliffe*, Ell. Bl. & Ell. 806; S. C. in the Exchequer Chamber, *Radcliffe vs. Watkin*, Id. 817. In both cases verdicts had been recovered. The last case was an action of ejectment. It was held that the "champerty" acts did not affect the transaction.

C. *States of the Union in which the lien of the attorney is rejected*.—Attorneys have no lien in Missouri; *Fressell vs. Hale*, 18 Misso. 18; nor in Indiana; *Hill vs. Brinkley*, 10 Indiana, 102; nor in Massachusetts or Maine at common law. In these two latter states it exists by statute. Decisions are to be found in *Potter vs. Mayo*, 3 Greenl. 34; *Stone vs. Hyde*, 22 Maine, 318; *Gammon vs. Chandler*, 80 Maine, 152; *Hobson vs. Watson*, 84 Maine, 20. The effect of the statute is to give a lien without notice. There is now no lien in California; and the decisions in Pennsylvania are apparently conflicting. *Walton vs. Dickerson*, 7 Barr, 376; *Balsbaugh vs. Frazer*, 19 Penn. 95; and *Dubois' Appeal*, 88 Penn. 231.

3. *The equitable right of set-off*.—The decisions of the Courts in England were for a long time at variance upon the question whether the attorney's lien was subject to the equitable right of set-off

between the parties. The King's Bench protected the lien of the attorney: the Court of Common Pleas and Chancery rendered it subordinate to the right of set-off. The decisions are too numerous to be cited. But now, by general rule, 16 Vict. 1858, no set-off can be allowed to the prejudice of the attorney's lien. *Simpson vs. Lamb*, 7 E. & B. 90; 4 Bligh N. S. 604; 1 Dowl. Prac. 196; 3 Id. 638. The New York decisions have favored the doctrine of the English Common Pleas. *Spence vs. White*, 1 Johnson's Cases, 102; *Sheppard vs. Watson*, 3 Caines, 165; *Porter vs. Lane*, 8 Johns. 857. Chancellor Walworth held that when a suit was brought in equity to compel a set-off of a judgment recovered in a different action, the Court would protect the attorney's lien, taking a distinction between claims arising in the same suit and in different suits; *Dankin vs. Vandemburgh*, 1 Paige, 622; *Gridley vs. Garrison*, 4 Paige, 647. The distinction was overruled in *Nicoll vs. Nicoll*, 16 Wend. 446, on account of the express language of the statutes of set-off. But when a *motion* is made to the discretion of the Court, the attorney's lien will be protected. Id.; *Simpson vs. Lamb*, 7 E. & B. 88. The cases in New York, following *Nicoll vs. Nicoll*, are disapproved in *Currier vs. Boston & Maine R. R. Co.*, 37 N. H. 228, and seem contrary to principle.

It is well settled that if the judgment upon which an attorney has a lien, is assigned, the assignee takes it, *cum onere*, and must satisfy the attorney's claim. In regard to the lien on an appeal, see *Shank vs. Shoemaker*, 4 Smith, 489.

4. *Remedies*.—In case of a collusive settlement before judgment, a proper remedy is to proceed with the suit. *Talcott vs. Bronson*, 4 Paige, 501; *Swain vs. Senate*, 5 B. & Pull. 99. The recent English practice is to move to set the release aside. *Jones vs. Bonner*, 2 Excheq

229. In case of collusive settlement after judgment, a motion may be made to vacate the satisfaction. *Rooney vs. Second Avenue R. R. Co.*, 4 Smith, 868. For additional authorities on the general subject see *Cross, Montague, and Whitaker on Liens*; *Maugham & Merrifield on Attorneys, &c.* Also, an elaborate case, *McDonald vs. Le Roy Napier* 14 Georgia, 89. T. W. D.

*In the Imperial Court of Paris, (Second Chamber.)*¹

MONS. EUGENE LARNEY, Presiding. January 6, 1862.

SUCCESSION OF GOURIÉ.

1. The inheritance, whether testamentary or from intestacy of a foreigner, and especially of an American of the United States, not domiciled in France, must be regulated as to personal property existing in France, without excepting the loans of the State by the law of the country where the foreigner's domicile was, and where, consequently, his inheritance was unobstructed.
2. This rule, founded upon the maxim *mobilia sequuntur personam*, has no exception, except where Frenchmen interested as heirs in the inheritance of a foreigner, have to defend themselves as to property existing in France against dispositions or statutes contrary to some one of the essential and fundamental rights rendered sacred by French legislation, such as the legal reservation, the prohibition of substitutions, &c.; in which case the right of deduction created by Article 2, of the law of July 14th, 1819, is open to them.
3. ESPECIALLY: The widow of a citizen of the state of Pennsylvania, married agreeably to the law of that State, which is also that of the inheritance, and endowed by virtue of its matrimonial law, with one-half of all the personal property of her husband, has a right to demand in France in opposition to a French universal legatee, the transfer, by virtue of this title, of the one-half of a *rente* inscribed upon the great book of the public debt. (Treaty of Reciprocity between France and the United States of September 15th, 1858.)

Andrew Gourié, otherwise called Boutard, a Frenchman, left Fontainbleau, his native city, in 1812, and went to settle in America, where he practised medicine for a long time. Being a naturalized citizen of Pennsylvania, in 1850 he married an American, at Philadelphia, the place of his domicile, and died there in 1857, leaving a will in his own handwriting, wherein he appointed his sister, Octavie Gourié, a Frenchwoman, his universal legatee, Anna Fisher, his widow, legatee of one-third of all his property,

¹ Translated and condensed from the *Gazette des Tribunaux* of January 23d, 1862, by W. D.

and leaving a legacy of six hundred dollars to the French Society of Beneficence of Philadelphia.

His estate consisted in America of \$1911, and in France, of two *inscriptions of rente* due by the State, amounting to 2280 francs, at $4\frac{1}{2}$ per cent.

The \$1911 were thus distributed in Philadelphia: the widow Gourié renounced the legacy, and claimed by virtue of the laws of Pennsylvania, the half of this sum. This half, some debts and expenses being first deducted, was awarded to her. The legacy the Society of Beneficence absorbed the surplus; so that the French universal legatee had no share in this distribution, although she was not excluded by the legislation of the country, which has abolished the right of escheat in case of aliens, at least as to personal property.

This division being made and sanctioned by a decision of the Supreme Court of Philadelphia, the widow Gourié required of her Octavie Gourié, the universal legatee, by a suit brought before the civil Tribunal of Fontainebleau, that a similar division should be made of the two *inscriptions of rente* against the State. The question in the suit was, whether the widow Gourié could avail herself of the laws of Pennsylvania, and of her renunciation of the provisions of the will, to assume the character of a doweress, whether the will must be supported as being the common title of the legatees; and consequently, whether the personal estate in France should be divided agreeably to the provisions of the law of July 14th, 1819.

The civil Tribunal of Fontainebleau having decided against the widow, she appealed from their decision to the Imperial Court. *Monsieur* Mapu appeared for the widow, and *Messire* Chaix d'Estange, the younger, for the sister of the deceased. After the conclusion of their arguments, *Monsieur* Moreau, the Advocate-General, submitted his views of the law to the Court in a learned address, from which the following are extracts:

We must first attend to the meaning of the law of 1819. By the second article it imposes upon the right of inheritance in France, which it grants to foreigners, a restriction which consists

in a deduction made from the property in France by the French heir who is joined with a foreigner, of a part equal to that of which he shall have been deprived in the foreign property of the deceased by virtue of the law of the country.

This right of deduction is justified by the necessity of maintaining equality between the co-heirs. It could not be that after having reaped the benefit of such legislation in their own country, the foreign heirs should pretend to an equal share of the property in France, and thus to enjoy a privilege at the expense of the French heir. Mons. Demolombe, and all the authors who have commented upon the law of 1819, explain it in this sense. They add that the French law must be applied to the property left by the foreigner in France, not only in its provisions respecting successions upon intestacy, but also in its provisions as to the effect of wills. The right of the legatee or the appointed heirs rests in fact upon the law, in successions from intestacy, as well as in testamentary successions.

But the will of Gourié, in which he bequeathed to his widow one-third of his personal property, has not been carried into effect in Pennsylvania, on account of the local law which secures to the widow the one-half of this same property. Thereby the universal legatee has beheld her rights curtailed, and she demands indemnification from the French property.

If, then, the law of 1819 were applicable to the inheritance of the sieur Gourié, the Tribunal of Fontainebleau would have judged correctly, that by virtue of this law there would have been ground to the advantage of the sister of the testator, as French heir, for the deduction of that which, in the Pennsylvania division, the widow had received over and above the third which had been bequeathed to her, and to which her share in France should be proportionably reduced.

But is the law of 1819 applicable? The first reason against this application springs from the existence of a treaty between France and the United States, giving to the citizens of the two nations a reciprocal right of succession.

The law of 1819 allows foreigners to succeed in France without

condition of reciprocity, and the deduction which it imposes on the foreigner, benefited by the law of his own country to the prejudice of the French co-heir, is the sole condition which it imposes upon this right of succeeding.

What are the conventions existing between the United States and France as to the inheritances of Frenchmen in America, and Americans in France?

The 11th Article of the Treaty of 1778 has ceased to be in force, as is proved by a resolution of the American Congress, adopted on the 7th of July, 1798. But, in 1800, there was a new agreement which re-established the 11th Article of the Treaty of 1778, and limited its duration to eight years.

It is only recently, September 15th, 1853, that a convention, inserted in the *Bulletin of Laws*, has provided for the reciprocal rights of Frenchmen and Americans to succeed in both countries. This convention provides in Article 7, 'In like manner and always reserving to itself the power of finally applying reciprocity in the matter of possession and inheritance, the French government acknowledges the right of citizens of the United States to succeed in France, in the matter of real and personal ownership and of inheritance, the identical treatment which French citizens enjoy in France in similar matters.'

But, under the government of international reciprocity, there is room for deduction; first, because the treaty which alone could authorize it, contains no provision which allows of it; next, because deduction belongs only to the system of the law of 1819, which has provided, diplomatic reciprocity being out of the way under the government of this reciprocity, that the inequalities of hereditary emolument which pertain to the difference of legislations, as well as to the comparative importance of the property which the deceased has left in either State may, as the case may be, either prejudice or benefit the people of our nation. The foreigner who comes to inherit in France, by virtue of the treaties, either suffers himself or benefits by this kind of inequality, without being able to indemnify himself out of the property in his own country, in which the French co-heir has the same right as if

he belonged to that country; just as the foreign co-heir comes upon the property in France exactly as if he were a Frenchman. There is no deduction for any one, both are equally subject, as to inheritance, to the laws of the country in which they succeed; the one because he is a citizen of that country; the other, because assimilated to him by international law.

We must not say that the treaty of 1853 makes the condition of Frenchmen worse in preventing the deduction to which they would be entitled if it were not for the treaty, for in a general point of view the deduction is compensated for by the advantage which Frenchmen obtain in becoming capable of inheriting where they were excluded. Most certainly it is this general interest which has been the reason for the treaty. Thus it is no longer the law of 1819, but the treaty of 1853 which should be applied.

The deduction, as well as the diminution of the widow's right to the third, instead of the half which the American law secures to her, must be denied to the universal legatee for another reason, which is that our law of 1819 is only applicable to the foreign co-heir, and not to the foreigner coming to exercise in the succession a right which is not of a hereditary nature. In effect, the Pennsylvania statute which the widow Gourié invokes is this: in the first place, a law called the *Intestate Act* of April 8th, 1833, provides for the widow's right to the third of the husband's estate, if he leaves children; if he leaves only collateral heirs, the widow's right, independently of the income of half the real estate, is to half of the personal property in absolute ownership. What must we call this right of the wife? The statute of 1833 is about to teach us.

It provides (section 11) for the case of the husband's having bequeathed one-half of his property to his wife, and to prevent the benefit of his liberality from being concurrent with the statutory right of the wife, which might occasion a double outlay, contrary to the intention of the husband, who might not have explained himself respecting it in his disposal of his property, the statute declares that this legacy or donation shall be considered as being in lieu of or in exclusion of the wife's dower in the property of the said testator, in

in the manner as if he had thus expressed himself in the will. And the text adds: 'Provided that nothing herein contained shall deprive the widow of her choice, either of dower or the estate or property so devised or bequeathed.' An explanatory law of April 14, 1848, repeats that the widow may take, as she may prefer, either the legacy or donation left to her by a testament or last will, her share in the personal property, by virtue of the said laws respecting succession or intestacy.

Thus the widow has her share in the property left by the husband, and this share, of which she cannot be deprived by any disposition made by the man, she takes under the title of dower. What, then, is dower? Pothier thus defines it. 'The wife's dower is that which agreement or the law grants to the wife in the property of the husband, for her support, in case she survives him.' According to Merlin, it was the principal of the nuptial gains and survivorship. Is dower, under the dominion of the Pennsylvania state, susceptible of the same definition?

We know that American legislation is, in general, borrowed from English legislation, and that the latter is itself based upon the principles of the law of the Germans. But Pothier states that the origin of the French law had the same origin. 'We find it,' says he, 'in the custom of the ancient peoples of Germany, who established themselves in our provinces. Tacitus relates that, among these peoples, the wives do not bring any dowry to the husbands, but receive it from them. This dowry, which the wife received from the husband, is really the same thing as our dower.'

Having a common origin among the two peoples on this side and the other side of the Channel, the almost immemorial institution of dower, if it sometimes varied in details, and as to the goods which composed it, was precisely the same as to its principle and as to its essential character. Thus we read in Blackstone: 'Tenant by the curtesy is where the husband of a woman is seised of an estate in fee inheritance, and dies; in this case the wife shall have the third part of all the lands and tenements whereof he was seised at any time during the coverture, to hold to herself for the term of her natural life.'

In our days an eminent magistrate of Great Britain has pronounced these words often quoted before the English or American tribunals: 'There are three things which the common law has always respected—life, liberty, and dower.'

Dower, therefore, has the same character everywhere; and the widow does not take by virtue of the right of succeeding, for her right exists previous to the opening of the succession; it is from that very time prior to that of the heirs, and, in reality, goes back to the day of the marriage. It is thus that on account of a right of widowhood granted by the Customs of Normandy, a decision of the Court of Cassation of the 29th of Nivose, in the year VI, has said, 'that it was irrevocable in its nature; that it was not in the power of the wife to abridge it, or to modify it, or to derogate from the disposition of the municipal law, upon the faith of which the marriage has been contracted; that we must not confound the rights acquired by the married couple by means of the marriage, with the mere rights of succession which the laws do not decree but at the moment of the opening of the succession.'

Let us add, that dower often takes effect upon the real estate alienated by the husband, even to the prejudice of third parties purchasers. Armed with a right of this character, cannot the wife avail herself of it *semper et ubique*, according to Dumoulin's expression, defining the effects of the matrimonial compact, express or implied? Undoubtedly not, if dower is a right confined to real estate. But it is different as to dower in personal property, of which Boullenois (Treatise upon Statutes, vol. 2, page 274) has said, after having admitted, for this supposition, the system of implied contract which, on the contrary, he rejects when dower in real estate is in question: 'It is a debt relating to personal property with which, at the instant of the marriage, the law of the matrimonial domicile charges the married couple. This debt is, indeed, *in pendent*, because it is uncertain which of the two will be the survivor; but death having happened, the right of the survivor is fully secured, and goes back to the moment of the marriage.'

Boullenois is also the author who has furnished the most solid foundations for the maxim, *mobilia sequuntur personam*. From

this maxim, as we have seen, article 2 of the law of 1819 derogates in a way that was necessary. But, outside of this law, the maxim ought to preserve its authority; it ought especially when it serves to give to the matrimonial compact all the consequences of which it admits according to equity and the law of nations.

Here the widow Gourié claims the benefit of the essential condition of the marriage. The personal statute gives her a dower in the personal property; she can demand it wherever her husband has left property of this sort; we say the personal statute, for the movable property connected with the person is regulated as to the right of disposal by the laws which govern it. The implied contract of the married couple having been that dower should attach to the movables left by the husband, how can his universal legatee, who represents him, escape from that contract? Why should the French law desire to oppose the execution of such an agreement when our statute as to real estate is in no degree affected by it; when there is nothing at stake but some interests in personal property, some *rentes* upon the State, which have no other character?

In short, gentlemen, that is a doctrine as just as it is generous, which, in personal property at least, makes the conventional or quasi-conventional rights of wives independent of territories and sovereignties. It belongs to you to proclaim it. Besides, we shall thereby escape the danger of reprisals, which, according to times and places, might threaten the rights of French widows, claiming them in foreign countries, no longer in customary dower, since that is abolished by the Code Napoleon, but in the stipulated dower, which, like the gain of survivorship, can still, under the government of this code, find a place in contracts of marriage.

We think, for these reasons, that there is cause for annulling the decision of the former Judges, and for ordering that the widow Gourié shall take for her dower the half of the *rentes* of 2280 francs."

After having deliberated, the Court gave judgment as follows:

“The Court, considering that Edme Auguste André Gourié, otherwise called Joseph Boutard, a Frenchman by birth, but a naturalized citizen of the United States, in the State of Pennsylvania, on the 21st of January, 1850, married at Philadelphia, for his second wife, and without marriage settlement, Anna Fischer, at present his widow;

“That the said Gourié died at the same place, without issue, on the 7th of March, 1857, leaving a will in his own handwriting, dated the 30th of March, 1858, in which, after having left to his wife his furniture and a third of all his real and personal estate, wheresoever situated, and a sum of six hundred dollars to the French Society of Beneficence of the city and county of Philadelphia, he has appointed, as his universal legatee, his sister, Octavie Gourié, residing in France and remaining a Frenchwoman;

“Considering that the widow, Gourié, has immediately renounced the advantages resulting to her from the will, to avail herself of the right which, in her capacity as widow, the statute of Pennsylvania authorized her to enforce against the inheritance of her husband; that is to say, to the half in full ownership of all the personal property depending upon it;

“Considering that the competent judicial authority, the Orphans’ Court of Philadelphia, has, by decision of the 19th of November, 1858, awarded to her this half, some debts and costs being deducted, of the part of the personal estate, which was in America;

“Considering that there is in France, and depending upon the inheritance of Gourié, some other personal property, especially two inscriptions of *rente* at $4\frac{1}{2}$ per cent., amounting together to 2280 francs of *rente*, upon the great book of the public debt, the half of which, in full ownership, the widow, Gourié, has claimed before the civil tribunal of Fontainebleau, in the same capacity and by the same title by which she had proceeded before the jurisdiction of Philadelphia;

“Considering that the former judges, giving effect to the will of Gourié, have allowed her claim only with restrictions, upon the ground that the French law governs all the personal property left

in France by a foreigner, especially the *rentes* inscribed upon the great book of the public debt, and because, according to the terms of the law of the 14th of July, 1819, there was reason to make, for the benefit of the universal legatee, Octavie Gourié, a deduction from the value of the *rente* in question, equal to that by which she found herself debarred from the personal property in America, owing to the modification made by the Pennsylvania statute in the will of Gourié;

“But considering that, according to the maxim *mobilia sequuntur personam*, it is a principle that personal property, whatever may be its nature, is, as to the right of disposing and receiving, subject to the personal statute of those to whom it belongs; that it follows that an inheritance, whether testamentary or from intestacy, proceeding from a foreigner not domiciled in France, and consisting of personal property existing in France, should be regulated by the law of the country where this foreigner had his domicile, and where, consequently, his inheritance is open;

“Considering that, if this principle is sometimes found modified by the interpretation which jurisprudence and erudition have given to the law of the 14th of July, 1819, it is especially, when Frenchmen, interested as residuary heirs in the inheritance of a foreigner, had to defend themselves upon the property existing in France against disposals or statutes opposed to some of the essential and fundamental rights consecrated by French legislation—such as the legal reservation, the prohibition of substitutions outside of settled cases, &c.; but that it could not be thus in a case where the universal legatee, who cannot avail himself of any legal reserve, finds himself opposed, not to a foreign co-heir, but to a joint-owner of a part of the property of the inheritance, who comes to exercise upon that existing in France, rights which she derives from her personal statute, and from that of the domicile of the deceased at the same time as from the 7th Article of the interposed treaty of the 15th of September, 1853, between France and the United States, by the terms of which, by way of reciprocity for the analogous concessions made to Frenchmen, the citi-

zens of the United States may possess in France personal and real estates in the same manner as the people of this country ;

“ Considering as to the right resulting from the personal statute in favor of the widow, Gourié, that it appears from the documents produced, that, in Pennsylvania, under the government of the common law, which is the separation of property, the wife, on the death of her husband, without leaving issue, has the right to claim, among other things, the half of his personal estate ;

“ Considering that, foreseeing the case of the husband's leaving a legacy to his wife of less importance, a law of the 11th of April, 1848, in derogation of that of the 8th of April, 1833, has reserved to the widow the choice between the enforcement of the legacy and the right of taking that portion of the inheritance of the husband, and that the power is acquired by her in so complete and absolute a way that the husband cannot affect it by any disposal, whether testamentary or otherwise ;

“ Considering that this advantage, which, under the name of *dower*, the statute of Pennsylvania has made a tacit matrimonial compact, has the same origin and the same cause as the customary dower of the old French law, and which in a similar manner establishes in favor of the widow, upon the goods of her husband which are subject to it, a right of property virtually pre-existing the day of the death, but which does not become effectual until that time ;

“ Considering that, as has been said, the widow Gourié has renounced the will to stand by her dower, and that by virtue of the peremptory decision given between her and the French Society of Beneficence of Philadelphia, on the 19th of October, 1858, her title of universal legatee appears to be legally and regularly turned into that of doweress and owner of half of all the personal property composing her husband's succession ; that it is, therefore, with good right that she now demands, in the same proportion, the ownership of that property existing in France, without any deduction being made, for the benefit of the French universal legatee, in the terms of Article 2 of the law of the 14th of July, 1819, since, from the causes above mentioned, it results that there is no

ance in the cause for Article 2 of that law, which treats only of the regulation of the respective rights of French and foreign heirs, even for the application of Article 17 of the treaty of September 15th, 1853, in so far as it has the same object;

"Annuls, and, deciding upon the main question, says that there shall be a grant, in complete ownership, made to the widow Gourié, otherwise called Boutard, of the half of all the personal property pending in France, upon the succession of her husband, and particularly of the half of two inscriptions of *rente*, $4\frac{1}{2}$ per cent., upon the French State, amounting to 2,280 francs, or the price of those which have been or should be sold, &c.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF MASSACHUSETTS.¹

Action for Refusal of Vote.—No action lies against the selectmen of a town for refusing to put upon the list of voters therein the name, and casting the vote, of one who was not a legal voter, although the proof produced by him to them was sufficient to establish, *prima facie*, his right to vote. and they may prove at the trial that, in fact, he was not a legal voter: *Lombard vs. Oliver*.

Promissory Note—Giving Time to Maker of, when Discharges Endorser.—The taking of money by the holder of an over-due note from the maker, in consideration of forbearance for a time to come to press him for payment, and forbearance accordingly, without the consent or knowledge of the endorser who has been duly notified of the dishonor of the note, discharges the latter from his liability thereon: *Veazie vs. Carr*.

Negligence—Law of the Road.—The driver of a team which is on the wrong side of a street, in violation of the law of the road, may, nevertheless, recover damages for an injury sustained by him from a collision with another team, the driver of which, in meeting him, carelessly or recklessly runs against him or his team: *Spofford vs. Harlow*.

The following abstracts, furnished by Charles Allen, Esq., Reporter, will appear in the forthcoming volume of the State Reports.

Action on Lost Bank Notes — What Evidence Necessary.—The owner of bank-bills, which cannot be identified or distinguished from other similar bills, cannot maintain an action against the bank which issued them upon circumstantial evidence that they have been destroyed, and in each case a bond of indemnity does not afford to the bank an adequate protection : *Tower vs. Appleton Bank.*

Agent—Liability of Broker for Selling Forged Note—Undisclosed Principal—An action lies to recover back money paid to a broker for a note, the signature to which is forged, sold to him without disclosing his principal, although he has paid the money to his principal, and although the note was sold for a sum less than its face : *Merriam vs. Wolcott.*

Liability of Draw-Tender of Bridge for Negligence—Evidence of Opinion.—A draw-tender of a bridge, appointed by the governor, with a salary, having full control and direction of the passing of all vessels through the draw, and of the opening of the draw, and of the care of the lamps upon the bridge, furnishing all necessary assistance therefor, whose duty it is to allow no unnecessary detention of vessels, having due regard and caution for the public travel, and who is required to give bond to the Treasurer of the Commonwealth for the faithful performance of his duties, is liable in damages to a person injured, solely through his favor to have due regard and caution for the public travel in performing his duties : *Howell vs. Wright.*

In an action against the draw-tender of a bridge to recover damages sustained by reason of his neglect, to have due regard and caution for the public travel in performing his duties, the opinion of another draw-tender as to the necessity of keeping a gate shut and lanterns lighted while the draw is open in the night time, is inadmissible : *Ib.*

Action for Negligence of a Jailor — Where it lies by a Prisoner.—A prisoner confined in a house of correction, under sentence of court, and while there put into solitary confinement for refractory conduct, in accordance with rules established for such cases, cannot maintain an action against the master for neglect to provide for him sufficient food, clothing and fires, if he is kept in one of the usual cells, and there is no evidence of express malice, or of such gross negligence as to authorize the inference of malice : *Williams vs. Adams.*

Mortgage—Action to foreclose by Second against First Mortgagee—

Executors.—A second mortgagee of land may maintain an action to foreclose his mortgage against the first mortgagee, who is in possession for the purpose of foreclosure, if the latter is also the owner of the equity of redemption, and under his execution may be put temporarily in possession, without an actual ouster of the first mortgagee: *Crovin vs. Hazletine*.

One of two executors may assign a mortgage given to his testator: *Ib*.

Award when a bar.—If a passenger who is traveling in and seated by an open window of a railroad car, receives an injury from the swinging of an unfastened door of a car, which has been left by another railroad company standing upon a track parallel with that over which he is riding, an award in his favor against the company by which the stationary car was left in its position, which has been returned into the Superior Court in compliance with the terms of the submission, and is still pending therein, without entry of judgment thereon, is no bar to an action by him for the same injury against the company in whose car he was riding, although the costs of the arbitration have been paid by the company against whom the award was made: *Todd vs. The Old Colony, &c. Railroad Company*.

Passenger on Free Ticket.—A railroad company which carries a passenger without fare, by consent of its superintendent and the conductor of the train, is liable for an injury sustained by him through the want of due and reasonable care in performing its duty: *Ib*.

What amounts to Negligence in Railway Passenger.—A traveler in a railroad car cannot recover damages against the railroad company for a personal injury sustained, wholly or in part, by reason of allowing his arm or elbow to be outside of the window: *Ib*.

Factor—Commissions when due—Evidence of Usage.—Under a written contract, by which commission merchants agree that they will receive goods consigned to them, and insure and sell the same in accordance with provisions therein contained, and charge on all such sales a certain specified commission, which charge shall include commission, labor, cartage, insurance, and every expense whatever, no action lies to recover for services or expenditures on goods consigned to and received by them under the contract, and not sold, but, at the termination of the contract, at the request of the consignees and by consent of the consignors, transferred by them to other commission merchants, who were appointed to succeed them as agents for the sale of the goods; and evidence is incompetent to prove

a usage of commission merchants to charge one-half commissions, under such circumstances; *Ware vs. Hayward Rubber Company*.

COURT OF APPEALS OF NEW YORK.¹

Will, construction of—Validity of Limitations and Trusts contained in, under Revised Statutes—A trust to receive the rents and profits of real estate and apply them to the use of the issue of the testator's infant children, for a period not exceeding two lives in being, is not void because the beneficiaries are not ascertained: *Gilman vs. Reddington, et al.*

The statute (1 R. S., p. 728, § 55) does not forbid a shifting use for the benefit, in case of the death of the primary beneficiaries, of persons unknown or not in existence at the creation of the trust: *Id.*

Nor, it seems, does the statute invalidate a trust which may permit the sale of the real estate and the application of the proceeds to the use of such unborn beneficiaries, within the duration of two lives in being: *Id.*

A provision in a will that trustees in whom real and personal estate was vested, should apply the rents and profits to the use of the testator's infant children and their unborn issue for the lives of the two youngest of three children, though, by possibility, two or more successive generations might enjoy the benefit for their lives, respectively, does not contravene the statute (1 R. S., p. 723, § 18) against the creation of successive life estates, or of a remainder for life upon a term for years, in favor of persons not in being: *Id.*

The trustees were required to "pay, convey, or make over" the real and personal estate upon the death of the two younger children, or the expiration of thirty years, to the survivors of such children or the issue then living of such as might be dead, in equal proportions, the issue to take the share of the parent, with a substitutional limitation in favor of other persons: *Held*, that the children took a vested fee determinable as to each upon his dying without issue within the prescribed period: *Id.*

It does not invalidate the trust that it enables the trustees, in their discretion, to apply the entire income and profits, or the estate itself, to the use of unborn posterity, to the exclusion of the testator's children: *Id.*

It creates no illegal suspense of the power of alienation, that the executors, after expiration of the trust term, may be required to retain in

¹ From E. P. Smith, Esq., State Reporter.

their possession real and personal property—the ultimate right to which has vested—for the purpose of paying the income to the widow for her life : *Ib.*

The will directed a certain portion of income to be accumulated, without restricting the period to the minority of the children. This provision being void as to the income after the termination of such minority, the surplus goes, *it seems*, to the children as presumptively entitled to the next eventual estate : *Ib.*

Libel—Privileged Communication.—The statute (ch. 130 of 1854) exempting from prosecution for libel the publishers of legislative debates, &c., is prospective only, and is no defence for a publication prior to its enactment : *Sanford vs. Bennett.*

The publication of a slander uttered by a murderer at the time of his execution, is not privileged either under that statute or at the common law : *Ib.*

The statute relates only to statements made in judicial, legislative, or administrative bodies in execution of some public duty : *Ib.*

Guaranty—Continuing Liability.—A contract to be “accountable that B. will pay you for glass, paints, &c., which he may require in his business, to the extent of fifty dollars,” is a continuing guaranty. The limitation is not of the credit to B., but of the extent of the guarantor’s liability : *Rindge vs. Judson.*

The doctrine of *Gates vs. McKee*, 3 Kern 232, re-affirmed : *Ib.*

Married Woman—Confessed Judgment by, void.—A confession of judgment, without action, by a married woman is void, although the consideration be money borrowed for and applied to the improvement of her separate estate : *Watkins vs. Abrahams.*

When husband and wife unite in confessing a judgment, it may be retained as good against the husband, though void as to the wife : *Ib.*

Statute of Frauds of Signature by Agent sufficient—Stock-jobbing act, evidence under.—A subscription by the agent of the party to be charged is sufficient under the statute of frauds, though the name or existence of a principal does not appear upon the instrument : *Dykers vs. Townsend.*

To avoid a contract as against the stock-jobbing act, (1 R. S., p. 710, § 6,) the burden of proof is upon the party alleging a violation ; *Ib.*

Stebbins vs. Leowolf, 3 Cush. 143, overruled on this point : *Ib.*

In an action by the vendor of stocks against a vendee refusing to perform his contract to purchase, it was a defence that the vendor did not own, nor was authorized to sell, sufficient stock to fulfill the contract in suit and his previous outstanding contracts. But evidence falling short of this, as merely showing contracts sufficient to absorb all the stock which the plaintiff had *proved* himself to own, is inadmissible : *Ib.*

Will, execution of—Proof of Handwriting of deceased Witness.—The certificate of attestation to a will by a deceased witness is not, it seems, equivalent to his testimony, if he were living, to the contents thereof, but is evidence of an inferior nature : *Orser vs. Orser*.

Such an attestation, in connection with the other circumstances of the case, may warrant a jury in finding the due execution of the will against the evidence of the other subscribing witness ; but would not, it seems, without regard to any intrinsic fact, support such a verdict against the positive testimony of a living witness : *Ib.*

No distinction exists between the force of the certificate, as evidence of what was done and heard by the deceased witness, and of what it states to have been also witnessed by the survivor : *Ib.*

Criminal Law—Pleading—Auterfois acquit—Embezzlement.—Upon an indictment containing nine counts for embezzlement of different grades, and others for larceny, a verdict, "guilty of embezzlement," is equivalent to an acquittal of the larcenies charged, and a bar to any subsequent prosecution : *Guenther vs. The People*.

One of the counts for embezzlement being good, the verdict means that he is guilty of the offence as charged therein : *Ib.*

An entry by order of the court after the jury was discharged, in amendment of the verdict as first recorded, that "the jury find the prisoner **not** guilty of the larceny charged," is unwarranted and nugatory : *Ib.*

Contract—Specific Performance—Practice.—A promise is to be interpreted in that sense in which the promisor knew that the promisee understood it : *Barlow vs. Scott*.

Accordingly, where the vendor of land undertook to execute such a conveyance as he had received from his grantor, which he said was a warranty deed—the same, in fact, containing only a covenant against "he

acts of the grantor—the purchaser, although he saw the deed under which the vendor held, understood it to be, and understood the vendor to promise a deed with general warranty, and the vendor knew that such was his understanding. *Held*, that the vendor was bound to convey with general warranty: *Ib.*

SUPREME COURT OF PENNSYLVANIA.

Executory Agreement to transfer Chose in Action—Effect of on Ownership—Action for Conspiracy—Evidence of Fraud and Complicity necessary to sustain.—A., entitled to certain post-office warrants for carrying the United States mails, which fell due quarterly, agreed, for a valuable consideration, that he would transfer them to B. for collection, stipulating that he should also pay out of the proceeds certain notes on which C. was surety. The warrants first falling due were allowed to go to B., but the warrants for two following quarters were received by A., who paid a portion of the proceeds to C., a portion to D., another of his sureties, and retained the balance. In an action of conspiracy brought by B. against A., C. and D., for corruptly and fraudulently conspiring to obtain the drafts, and withhold the proceeds from him, knowing them to be his property, *Held*,

That the engagement by A., that he would assign and endorse the drafts as they were received, to B. for collection, amounted only to a promise on A.'s part, and that by the agreement the ownership of the warrants and drafts did not vest in B., for at the time it was made they had no existence, and the service for which they were given had not been performed.

That where the evidence failed to sustain the averments in the declaration as to the ownership of the drafts and the appropriation of the proceeds, knowing them to be the plaintiff's, or to establish any complicity on the part of C., one of the defendants, it was error in the Court to refuse to charge the jury that they were bound to render a verdict of *not guilty* as to him.

That any admissions of the co-defendants as to C.'s declarations in regard to the time when he received the money from A., were not evidence against C., made, if after the alleged common design to defraud the plain-

¹ From Robert E. Wright, Esq., State Reporter, to be reported in the 4th volume of his Reports.

tiff had been accomplished; nor, if the alleged declarations had been made in furtherance of a common purpose, were they admissible against C. until his connection with that purpose had been shown *aliunde*.

That even if C. had known of A.'s agreement with the plaintiff when he received part of the proceeds of the drafts in payment of his debt—the drafts not being the property of the plaintiff, but only promised to be endorsed to him for collection—his act was not illegal. If a creditor agree to receive money which his debtor has previously promised to another, it is not a conspiracy, and his receipt of the money when paid, will not render him liable to respond in damages to the other creditor, though he knew of the promise which the debtor had made: *Bedford vs. Sanner*.

Bequest of Personal Property, with Limitation over, when valid—Intention of Testator, how far controlled by Rules of Law.—A testatrix made bequests of personal property to H. and to O., with a proviso, in a subsequent part of the will, that if either should die without children, the bequests made to either of them should “fall back to the survivor and to B., or the survivor of them and the next of kin of such survivor.” On an application by A. to the Orphans’ Court, for the absolute payment of the bequest, and without security for those to whom it was to fall back, *Held*,

That although, in a will, the word “children” (which is ordinarily a word of personal description) may be construed to mean issue, (which *ex proprio vigore* indicates succession,) where the context affirmatively shows that the testator intended so to use it, it must be held to its ordinary and usual meaning when no such intention is manifest.

That the intention of testatrix in this case, to give the legacy to B. and O., and the next of kin of survivor, was clear, in case they should outlive H., and she should die without children, and was, therefore, not to be defeated by an arbitrary rule of law, unless it appeared that testatrix also intended to give to H. at least an estate tail, and that the limitation over should not take effect until all the heirs in tail should become extinct.

That the limitation over on the death of A. was not a limitation after an indefinite failure of issue, and for that reason too remote, because there were indications in the will that the gift should take effect, if at all

on the death of the first taker, and not an undefined period in the future, and that, therefore, the first taker was not entitled to receive it as an absolute bequest, without security to the executors for the legatees over: *Bedford's Appeal*.

Estate Tail created by Will—Children, when a word of Limitation—Failure of Issue, definite and indefinite—Testamentary Trusts.—A testator, by will, directed his executors to account for and pay over, half yearly, to his three daughters, “and to each of them during their natural lives, the income or profit arising out of each of their share of the residue, and after the death of either, then to descend and go to the child, and if children, share and share alike; should, however, either of my daughters die, and leave no lawful issue, then such share or portion is to fall back again to the residue, and form a part of the same.” *Held*, that the daughters took an estate tail in the residue of the testator's estate, which, under the Act of April 27th, 1855, became an estate in fee simple: *Haldeman vs. Haldeman*.

Whenever, in the devise of a remainder to the “child” or “children” of the first taker, it clearly appears that those words are used in the sense of “issue” or “heirs of the body,” they are to be treated as words of limitation, describing lineal succession to an entail, and not as words of purchase in their usual sense: *Id.*

The devise being to the daughters for life, with remainder to their children, the gift would lapse in default of issue, for the testator had defined the word child as meaning issue, and the legal consequence of a lapse in default of issue must follow: *Id.*

There was no such trust executed by the will, as would prevent the operation of the rule, that an estate for life, with remainder to the issue of the first devisee, is an estate tail in law: *Id.*

Conveyance of Estate in Expectancy—Mortgage of Wife's expected interest in her Father's Estate, for Debt of Husband, invalid.—A married woman gave a mortgage to a creditor of her husband's, of “all the estate, right, title, and interest,” to which she would be entitled in her father's estate, on his death, and also covenanted with her husband “to stand seized of said estate, right, title, and interest, to the use of the mortgagee and his heirs, and to make further assurances.” The mortgage was

given for the sole purpose of securing a prior debt of the husband's, and no consideration was received by her, or given by the mortgagees. After the death of the father, the mortgagee claimed her share of the real estate. *Held*, that he was not a purchaser for value, and that the mortgage did not enable him to hold against her the share of her father's lands, which descended to her at his death: *Bayler vs. The Commonwealth for use, &c.*

Where a deed does not undertake to convey an existing estate, and the subject of the grant is only an expectancy, the deed is executory only, and nothing more than a covenant for future conveyance; for the grant and the covenant contemplate the assurance of an estate which might possibly be thereafter acquired, either by descent or will, an assurance necessarily future, and inoperative at law: *Ib.*

Though a conveyance of an expectancy, as such, is impossible at law, yet it may be enforced in equity as an executory agreement to convey, if it be sustained by a sufficient consideration: *Ib.*

ABSTRACTS OF RECENT ENGLISH DECISIONS.

CROWN CASES RESERVED.

Embezzlement—Master and Servant—Partnership.—The prisoner, the cashier and collector of a manufacturing firm, had, in addition to a fixed yearly salary, a per-centage on the profits made by the firm, but was not to be liable for its losses. He had no control over the management of the business. *Held*, that he might be indicted as a servant for embezzling the monéys of the firm: *The Queen vs. Macdonald*, Nov. 9, 1861.¹

Embezzlement—Secretary—Member of Friendly Society.—The prisoner was a member of a duly certified friendly society. He was also paid secretary to the society. His duty, among other things, was to keep correct accounts of the receipts and expenditure of the society, to receive the moneys weekly from members, and to pay what was due from the society, and weekly to place the balance in the society's box, which was left in the lodge room. He appropriated to his own use certain sums paid in by

¹ 81 L. J., Mag. Cases, 67.

members, and omitted to enter them as received in the society's books. *Held*, that he might be convicted of embezzling the money: *The Queen vs. Proud*, Nov. 21, 1861.¹

Poison—Administering Cantharides to a Female with Intent to excite her Sexual Passions.—If a man administers cantharides to a female with intent to excite her sexual passions in order that he may obtain connexion with her, he is punishable under the statute 23 Vict. c. 8, s. 2, which makes it a misdemeanor to administer to any person any poison or other destructive or noxious thing with intent to injure, aggrieve or annoy such person: *The Queen vs. Wilkins*, Nov. 21, 1861.²

Indictment—Felony—Verdict of Guilty of Attempt—Stat. 24 and 25 Vict., c. 96, s. 57.—The prisoner was indicted under the stat. 24 and 25 Vict., c. 96, s. 57, for breaking and entering a shop, with intent to commit a felony, viz. to steal. It was proved that the prisoner broke in the roof, with intent to enter and steal, and was then disturbed; but there was no evidence that he ever entered the shop. *Held*, that the prisoner might be convicted of the misdemeanor of attempting to commit a felony: *The Queen vs. Bain*, Jan. 18, 1862.³

False Pretences—Offence, where Triable—Wrong Venue—24 and 25 Vict., c. 96, s. 114.—One who obtains goods by false pretences, in one county, and afterwards brings them into another county, where he is apprehended with them, cannot be indicted for the offence in the latter county, but must be indicted in the county where the goods were obtained: *The Queen vs. Stanbury*, Jan. 18, 1862.⁴

Attempt to steal—What sufficient to constitute.—The prisoner was a servant to a contractor who supplied meat to the camp at S. The course of business was for the contractor each morning to send by a servant a quantity of meat to the quartermaster-sergeant at the camp, and a soldier from each mess attended. The quartermaster-sergeant had his own scales and weights; with these he and the contractor's servant weighed out the proper quantity of meat for each mess respectively, which, after being weighed, was delivered to the soldier in attendance for the mess. The account of the whole meat so delivered was credited to the contractor as supplied to the Queen. The surplus meat remaining after the messes had,

¹ 81 Law J., Mag. Cases, 71.

² 81 Law J., Mag. Cases, 72.

³ 81 Law J., Mag. Cases, 88.

⁴ 81 Law J., Mag. Cases, 88.

been supplied, used to be taken back by the contractor's servant. On one occasion of a weighing, the prisoner being in charge of the meat, and being the person who put the weights into the scale, fraudulently and with intent to cheat, put a false weight into the scale instead of the true one of the quartermaster-sergeant; so that when all the messes had been supplied 60 lb. of meat remained over, instead of 15 lb. A complaint having been made by a soldier, of short weight during this weighing, an investigation took place at its close, and the fraud was discovered. The prisoner absconded at the commencement of the investigation. The intention of the prisoner was to steal the difference between the just surplus of 15 lb. and the actual surplus of 60 lb. Nothing remained to be done by him to complete his scheme, except to carry away and dispose of the meat, which he would have done if the fraud had not been detected. *Held*, that on these facts the prisoner was rightly convicted of attempting to steal 45 lb. of meat, the property of the contractor: *The Queen vs. Cheeseman*, Jan. 18, 1862.¹

Receiving Stolen Goods—Receipt by Wife in Absence of Husband—Ratification.—A wife, in the absence of her husband, and without his knowledge, received stolen goods, and paid money on account of them. The thief and husband afterwards met. The latter then learnt that the goods were stolen, and he agreed on the price which he was to pay for them, and paid the balance to the thief. *Held*, that on these facts, the husband might be convicted of receiving the goods, knowing them to be stolen: *The Queen vs. Woodward*, Jan. 18, 1862.²

Perjury—Materiality—False Evidence improperly admitted.—On the hearing of an application for an order of affiliation against H. in respect of a full-grown bastard child born in March, the mother, in answer to questions put to her in cross-examination, denied having had carnal connexion with G. in the September previous to the birth. G. was called to contradict her: the Justices admitted his evidence, and he wilfully and falsely swore that he had had carnal connexion with her at the time specified. *Held*, by eleven of the Judges (Crompton, J., and Martin, B., dissenting,) that, although the evidence of G. ought not to have been admitted to contradict the mother on a matter which went only to her credit, still, as it was admitted, it was evidence material to her credit;

¹ 31 L. J., Mag. Cases, 89.

² 31 L. J., Mag. Cases, 91.

and, consequently, so far material in the inquiry before the Justices as to be capable of being made the subject of an indictment against G. for perjury: *The Queen vs. Gibbons*, Jan. 18, 1862.¹

Manslaughter—Duty of Parent to Daughter—Neglect to call in Midwife in Daughter's Labor.—A young woman, who was eighteen years of age, and unmarried, and who usually supported herself by her own labor, being pregnant, and about to be confined, returned to the house of her step-father and mother. The girl was taken in labor (the step-father being absent at his work.) The mother did not take ordinary care to procure the assistance of a midwife, though she could have got one, had she chosen; and in consequence of the want of such assistance, the daughter died in her confinement. There was no evidence that her mother had any means of paying for the services of the midwife. *Held*, that there was, under the circumstances, no legal duty on the part of the mother to call in a midwife, and consequently no such breach of duty as to render her liable to be convicted of the manslaughter of her daughter: *The Queen vs. Sarah Shepherd*, Jan. 25, 1862.²

NOTICES OF NEW BOOKS.

PENNSYLVANIA STATE REPORTS. VOL. 89. Comprising Cases Adjudged in the Supreme Court of Pennsylvania. By ROBERT E. WRIGHT, State Reporter. Vol. 8. Philadelphia: Kay & Brother. 1862.

The previous volumes of Mr. Wright's series were very well done, and this is an improvement on them. It is to be hoped that the standard now reached will be maintained in the future, and that the judiciary of this State may be permanently relieved from its old incubus of careless and ignorant reporting. No matter what learning and abilities may characterize the bench, its general reputation will infallibly be affected by the style in which its decisions are brought before the public. These must, of course, be studied by the profession at home; but the task of laboring over an incomprehensible report is too irksome, and the danger of relying on an erroneous syllabus is too great, to make them often consulted by judges and lawyers elsewhere. The opprobrium, which justly belongs to the Reporter, casts a shade upon the Court.

Mr. Wright has obviously taken much pains with his task. His head notes are skilfully prepared; and they have prefixed to them a short

¹ 31 L. J., Mag. Cases, 96.

² 31 L. J., Mag. Cases, 102.

abstract of the subjects to which they relate, which is a great convenience and deserving of imitation by other Reporters. The statements of fact are clear, and void of unnecessary repetitions. But the most noticeable feature of this, as of the previous volumes, is the care which has been bestowed on the summary of the arguments of counsel, which has been too much neglected in this country. It would be invidious to suggest, that under our present system of low salaries, some of the best lawyers are off the bench. But we can say without offence, that there are men at the bar everywhere, whose learning and ability are such as to make their "Forensic Exercises," to use Mr. Hargrave's ambitious phrase, as instructive as the actual judgments of the Court. We need only refer for an illustration of this to the English Reports, which, from the greater attention paid to this branch of the editor's duty, are so much more useful than most of our own, both to the student and the practitioner. Indeed, when we consider that counsel, under the stimulus of professional zeal in each particular case, and with more available time to devote to its special study, are naturally more thorough in the investigation of authorities, and more fertile in the discovery of arguments than most judges can be, it seems absurd to neglect so valuable a source of legal information, to rate it no higher. Besides, a good report of the argument, is often necessary now-a-days, in order to ascertain what was really the decision of the Court, or at least its value as a precedent. The judgments of our Courts are seldom given on the spot, and are sometimes postponed so long that the arguments of counsel seem to have evaporated from the judicial mind, or to have left at best but a mere sediment of authorities, which is not always worked up again to the best advantage. The result in such cases, is that, according to the idiosyncrasy of the judge who delivers the opinion, we are favored with an original and elaborate disquisition on the subject at large, or else with an ethereal tissue of inconclusive abstractions, which in either alternative, is apt to leave the real points in controversy untouched. To report the arguments of counsel in full, has, therefore, this advantage, that it enables us, by contrast, to reduce these judicial aberrations to their true plane, and at the same time supply a reverential check on their too frequent occurrence. For surely no judge who turns to a case reported and sees how high he has soared above, or how far he has shot aside from the humble mark, but will instinctively incline to a more accurate range for the future.

Possessing the characteristics, to which we have referred, we rank Mr. Wright's reports very high among those with which the Pennsylvania bar has been at different times favored or afflicted.

H. W.

THE
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THE JURISDICTION OF THE COURT OF CHANCERY
TO ENFORCE CHARITABLE USES.

(CONCLUDED.)

The law of charities considered in reference to personal property.—
The peculiarities in reference to charitable uses in personal property have been reserved for a separate discussion. If chattels devoted to charity by gifts *inter vivos*, no reason is perceived why the law of charitable trusts should not be fully applicable. A difficult question arises when a gift is made by testament.

To obtain a clear view of this question, an examination should be had in respect to the disposition of the effects of intestates. There can be no doubt that the bishop or ordinary from an early period had the control of personal assets where the owner died intestate, for the purpose of applying them to pious uses. What the precise origin of his power is not entirely clear. Some respectable authorities regard it as a branch of the royal prerogative—the right to take such goods as had no owner (*bona vacantia*); others of great weight, among whom is Selden, discard this idea. However this may be, it is believed, that, as far as administrators were concerned, the question became unimportant

after the statute of 31 Edward III., c. 11. This act expressly requires administrators, as deputies of the ordinary, after satisfying debts, to dispend the personal property for the soul of the deceased.¹ It is said in Theloall's Digest (written A. D. 1579) that the object of this statute was to enable administrators to sue in the king's courts. They had previously been appointed by the bishop, but could not bring actions. Their duties were now assimilated to those of executors.² Their conduct became from this time, at least, subject to the supervision of the superior courts, and their duty to dispend for the soul was even recognised, in the common law tribunals. The language of the statute appears to refer to an already existing practice. As between two creditors, it was deemed a breach of duty to pay a debt before it was due, rather than one already due. An injury was done "to the soul of the deceased," and they might be compelled to repay the money from their own estate.³

These views are confirmed by the fact that administration must have been committed in such a manner that the administrator could dispend for the soul of the deceased; otherwise he was not, in view of the courts of law, "administrator," but only a servant of the ordinary. The form of such a limited appointment is given in the case cited in the note, and is perhaps the earliest extant.⁴ He would now be termed "a collector." The proposition in this case undoubtedly means that an appointee with such qualified powers was in the same position in which an administrator would have been before the statute of Edward III., and bound to account only to the ordinary. Where the statute was not complied with, the ordinary himself was administrator and was responsible in the

¹ Yet Lord Eldon, in *Moggridge vs. Thackwell*, mentions it as a singular fact, that the ordinary, of *his own accord*, had determined to apply a portion of the personal estate of every intestate to charity. This statute had evidently escaped his notice. Blackstone, in alluding to the statute 31 Ed. III., does not mention this clause. 2d Book of Commentaries, p. 496.

² Theloall cites 19 E. III., 20 and 24. His Digest is bound with the "Register of Writs."

³ Year Book, 9 Ed. IV., 18.

⁴ Year Book, 16 Ed. IV., 1, case 4.

superior courts as such.¹ The duty of the administrator to dispend for the soul was similar to that of an executor who held a residue not disposed of by the will. This was termed a "general trust."² A gift in general terms to an executor to "dispend for the soul" was inoperative because he was previously and by force of his office under an obligation to expend the money in that manner. This was so held at common law.³ A residuary gift to him expressly to his own use was valid, but if the general words "to pay the debts and to expend for the soul" were added, the legacy was not beneficial but a general trust. The court remarked that all works of charity were within the intent.⁴

There was no reason why the Court of Chancery should not enforce these general trusts. An administrator's duty could not be enforced in the ecclesiastical Court, for by the grant of administration the ecclesiastical authority was gone.⁵ It was well settled at an early period that an executor in respect to debts held the personal property as a trustee, though no specific direction to pay debts was given to him. He was compelled by the process of a Court of Chancery to pay them.⁶ The ground of this rule was that the obligation bound *his conscience*, as he had no right to receive the assets, except as he took them with the just charges to which they were liable. No reason is apparent why the same view should not be taken of the obligation to "expend for the soul." Both duties are named in the statute of Edward III.; both are coupled together in the wills of that day; both are termed, in the early authorities, general trusts. The striking fact that the payment of debts and the appropriation of property to charitable purposes are everywhere spoken of together, is well explained in the statute of Henry V., previously cited. The fulfilment of each of these duties was equally advantageous to the soul of the testator. The result is that, in the absence of specific

¹ Year Book, 11 H. IV., 78; stat. 13 Ed. I. c. 19.

² Cary's Reports, p. 28.

³ Year Book, 21 Ed. IV., 6, case 15.

⁴ Haneks vs. Alborough, (O. B.), Sir F. Moore R. 754.

⁵ 2 Bla. Comm. 515; Williams' Ex. 1169; 1 Spence Eq. Jur. 579.

⁶ 1 Spence's Equitable Jurisdiction of Court of Chancery, pp. 191 and 192.

directions by the decedent, the duties of personal representatives were the same in respect to debts and charities; and that they could have equally been enforced in Chancery except from the technical difficulty, in the case of charity, of naming a plaintiff. The duty of the administrator rested upon the statute; that of the executor who held a residue, reposed upon general principles of law.

It may be urged in opposition to this view that no authorities can be found to sustain it. If this were admitted, it would not be decisive. We can in these remote periods only look for fragments and shreds of proof. There were no Chancery reports, and as Mr. Spence justly remarks, equity jurisprudence could not possibly have been so poor and jejune as would be inferred simply from the reported cases. There is however some proof on the subject. When the statutes of Elizabeth were passed, the ordinary was expressly excepted and retained the same power as before. Still he could be charged in respect to charitable uses by the commissioners until an administrator was appointed, and must be summoned in such a case to attend the hearing.¹ From what source was this power derived? Manifestly not from the statute. It is believed to have originated in this manner. The ordinary's own duty to pay debts was enforced by statute, and where no administrator was selected he was certainly liable to that extent in the common law courts. He therefore held like an executor under a general trust which was ultimately extended to the residue held for the soul of the deceased. It having been shown previously that the commissioners exercised no new jurisdiction, the inference is that the Court of Chancery could have enforced the application of intestates' estates to charitable purposes before the statutes of Elizabeth.

II. We may now regard the case of executors *and the subject of legacies*. It will only be necessary to discuss the question when a legacy was given by the testator. The duty of an executor in respect to a residue not disposed of in the will has been sufficiently noticed. The trust of the executor in such a case, it is clear, did not depend upon any statute.

¹ Duke on Charitable Uses, 185 and 152.

It is not to be disputed that the ordinary had jurisdiction over legacies of personal property. The principles of the Roman law were largely adopted and amplified in the ecclesiastical courts. Great favor was shown to legacies given to pious uses. It is not our purpose to state the results attained in these tribunals. The authorities named in the note amply and learnedly illustrate them.¹ It is only designed to show that no "plain, adequate and complete remedy" could be had in these courts, and that, therefore, Chancery, in accordance with the ordinary rule which guided its action, was induced to entertain jurisdiction.

The power which the ordinary possessed to carry his decrees into effect was that of excommunication. Stringent as this remedy was, it was indirect, while that of the Court of Chancery was direct, and the recusant could be confined in prison until he obeyed the decree. Thus, in Owen's Reports, it is stated that the Master of the Rolls said "that when executors had goods of a testator to dispose of to pious uses, their power is subject to the controlment of the ordinary, and he may make distribution of them to pious uses. It was said at the bar that the ordinary might make the executor's account before him, and might punish them according to the law of the church if they spoil the goods, but *cannot compel them to employ them to pious uses.*"²

The following additional reasons for the belief that the Court of Chancery actually exercised jurisdiction, are submitted.

1. The Court must have been appealed to for the purpose of discovery. When the statute for the distribution of intestates' estates was passed, it was argued to the Lord Keeper that the distribution could only be enforced in the ecclesiastical court. He summarily disposed of the objection with the contemptuous remark that the probate court had but "a lame jurisdiction."³ This "lame ness" was equally apparent in the case of legacies. Some authorities take the ground that the jurisdiction of Chancery in

¹ Swinburne on Wills; Mr. Noyes' argument in *Beekman vs. Bonsor*; Mr. Bradford's argument in *Rose vs. Rose*. See the concluding note to this article

² P. 33, 40 Eliz.

³ *Matthews vs. Newby*, 1 Vernon 133 (1682).

the case of legacies first attached for the purpose of discovering assets, and that upon usual principles the court retained jurisdiction with the object of enforcing the legacy.¹ So in an old case, it is given by counsel as a reason why a monk could be executor, that he holds for the use of another, and may be compelled to give testimony *in Chancery*.² It is well known that a monk was regarded as civilly dead, and could not be party to an action in the ordinary tribunals. This statement was made a hundred years before the statutes of Elizabeth, and was not disputed. It is not conceivable that it should have been made if the jurisdiction had never been exercised.

It is entirely clear that bills of discovery in respect to legacies were entertained before the year 1600. Thus in West's *Symboleography*, written in 1594, there is given at full length the form of a bill in Chancery to compel executors to pay legacies. It is addressed to Sir Nicholas Bacon, and alleges as a reason why Chancery should entertain jurisdiction, that the plaintiffs are not acquainted with the assets which the executors had collected, and that there was no adequate remedy in the ecclesiastical court. If this form was taken, as is altogether probable, from a bill actually used, it must have been filed before 1579, as Sir Nicholas Bacon died in that year.³

2. It is altogether probable that application was made to the Court of Chancery for the purpose of saving expense and delay. The regular course of proceeding in the ecclesiastical court was to appeal from the ordinary's decision to the Pope at Rome. These appeals were taken away in the reign of Henry VIII. No such appeal could be taken from the king's courts. Suitors for this reason in the time of Henry VII. and Henry VIII. had recourse to the Star Chamber for the recovery of legacies. Says an author of repute, "Another sort of usual complaints in point of justice was for matters testamentary, of which there are very many

¹ *Keily vs. Monck*, 8 Ridgway P. Cas. 243; *Hurst vs. Beach*, 5 Maddock 360; *Fielding vs. Bound*, 1 Vernon 280.

² Year Book, 12 H. VII., 28.

³ West's *Symboleography or Precedents*, part 2, § 161 (Ed. 1601). Forms of other bills against executors will be found in this book.

examples. King Henry VII. heard a cause betwixt Haughton, a saddler of London, and Barker, a goldsmith, and decreed to the plaintiff two hundred marks, according to the intention of the will of one Haughton, deceased. In Henry VIII.'s time it was also usual, and the court gave order to have the testator's goods put in safety to be inventoried as in Sessions case."¹ This interference, according to the writer, was due to the frequency and expensiveness of appeals from the ordinary's decisions. This authority is of great importance, as showing that the ecclesiastical court had no such *exclusive* jurisdiction as to prevent other courts from taking cognisance of testamentary matters. If the Star Chamber was induced to interfere on account of a defect of justice and to prevent a right of appeal to a foreign government, still more would the Court of Chancery, whose office it was to give remedies of a more adequate and complete character than could be obtained elsewhere, relieve the suitor from the burden of frequent and ruinous appeals. Says Mr. Spence, "the jurisdiction of Chancery over executors and administrators appears to have gradually grown up from its being found that there was no other tribunal capable of doing effectual justice to all parties interested."²

3. A more important reason why Chancery should enforce legacies, was on account of the trust reposed in the executor by the testator. This trust might be twofold. The chattels might be given to the executor in trust to perform some act, or there might be a legacy directly to some object without any gift to the executor.

First. If the gift was to the executor, what was called a *special* trust was created as distinguished from the general trust where no gift was made.³ As such it could only be recognised in Chancery, for the Spiritual Court could never enforce the execution of a trust.⁴ Cases of this kind are to be found in the early reports. Thus an executor compelled a co-executor to give sureties for the

¹ 2 Hargrave's *Collectanea Juridica*; (Treatise on Star Chamber) p. 56.

² 1 Spence Eq. Jur. 579, citing cases from the reign of H. VI. and Ed. IV.

³ Cary's Reports, p. 28.

⁴ *Farrington vs. Knightly*, 2 P. Wms. 548.

performance of a trust in a will concerning money.¹ Trust property of a similar kind was followed into the hands of the executor's representatives.² So the Court, after entertaining jurisdiction in respect to a legacy, granted an order to show cause why an injunction should not be issued against a party who endeavored to proceed in the ecclesiastical Court.³ As a general principle of equity jurisprudence, it was well settled, that whenever the will of the deceased was in danger of being frustrated, the Court would make a decree not only against the executor, but against all who took with notice of the trust. Lord Keeper Egerton declared the legacy in such a case to be both an express and implied trust, and compared it to that of the assignment of a chattel in trust, where the assignees were then compelled by the common course of the Court to execute the trust.⁴

These principles were applied to charities. Money could be given for such uses as well as land. Men were accustomed from an early period to give money to their friends to deliver it to their administrators to be expended for the good of their souls. Such money was held in trust, so that the administrator could proceed in Chancery to recover it.⁵ Sometimes money was given by one person to another to be disposed of after the donor's death for the good of his soul. The donee became a "special executor," and the money could not be recovered of him by the executors of the will.⁶ Clearly he was a trustee over whom the ordinary had no jurisdiction.

The calendars in Chancery show that charitable legacies to executors were trusts and were established in that Court. The cases of this kind will be noticed hereafter.

Second. The still more important question remains as to the enforcement of legacies given to legatees other than the executor.

¹ Cotton *vs.* Cawston, Cary R. 118, 21 and 22 Elizabeth.

² Wray *vs.* Sapoote, Cary R. 128, 21 and 22 Elizabeth.

³ Parre *vs.* Tiplady, Cary R. 104, 21 and 22 Elizabeth.

⁴ Sydnam *vs.* Courtney, in Chancery, Moore R. 567, 41 and 42 Elizabeth.

⁵ Year Book, 4 E. IV., p. 87.

⁶ Year Book, 8 E. IV., 5, per Needham, J.

Mr. Spence is of the opinion that from the time of Charles I. and probably earlier, jurisdiction was entertained in all cases of legacies. The authorities already cited place the jurisdiction before the year 1600. To these, the following may be added. Suits in the ecclesiastical Court for legacies were stayed by injunction in the fourth and thirty-second years of the reign of Elizabeth.¹ So where a legacy was given to a female if she married with the consent of her friends and she married without their assent, it was decreed to her.²

Similar results were reached in the case of charities. Many decisions of this kind are collected by Mr. Binney in the note to *Vidal vs. Girard*. In some instances, the charities were of the nature of *foundations*. In one case, the object of the suit was to recover a legacy of £400 bequeathed for the purpose of producing a yearly fund for the relief of the poor.³ In another, the object was to recover a legacy which was directed to be *invested at interest* for the poor.⁴ These suits were brought by one inhabitant of the parish in behalf of himself and others, against the executors. In some instances, where the money was given for the perpetual benefit of the poor, the bill prayed that the Court would direct the purchase of land for that purpose.⁵ One of these suits to recover bequests of a charitable nature was instituted as early as the fifteenth year of Queen Elizabeth.⁶ Charity legacies for the poor were ordered to be paid in preference to others, on account of equity and good conscience.⁷

A remarkable case from the Year Books illustrates the desire of the early Chancellors to enforce charitable dispositions. An executor was wasting the assets, and his co-executor commenced a

¹ *Cary vs. Mildmay*, 82 Eliz.; *Denton vs. Biggot*, 4 Eliz., cited in the Introduction to *Praxis Almæ Curie Cancellariæ*, p. 40, 41.

² *Yelverton*, contra, *Newport*, 86 Eliz.

³ *Fytche et al. vs. Robinson*, 1 Calendars in Chancery, 184, case 44.

⁴ *Carlton vs. Blythe*, 1 Calendars, 159, case 10; *Mayor of Chester vs. Brooke*, 1 Cal. 216, case 42.

⁵ *Sayer vs. Lambe*, 1 Cal. 899, case 26.

⁶ *Fisher vs. Phillipps*, 8 Cal. 298, case 28.

⁷ 1 *Spence Eq. Jurisd.* 887 (an. 1588).

suit in Chancery against him. The Chancellor thought the case a proper one for equitable relief. "Let no one," he said, "depart from the Court of Chancery without a remedy." (*Nullus recedat a cancellaria sine remedio.*) The counsel for the defendant (Fineux) insisted if that maxim were true, there would be no need of a confessor—and that this particular case belonged to the confessor. The Chancellor replied that the law of the land should agree with the law of God, and that such an executor who wasted the goods would be "damned in hell."¹ He then rehearsed the will, saying that the executor was directed to dispose of the goods for the weal of the testator's soul, and that if he did not do it, there was a good remedy in Chancery. He however expressed his willingness to hear further argument. The case does not appear to have been moved again. The fact that it was thought worthy of being reported in the Year Books, where so few Chancery decisions in comparison are found, shows that the case was regarded as one of importance. It is remarkable that Fineux, who, when Chief Justice, was notoriously no friend to the Court of Chancery, did not raise the objection that the case was exclusively cognisable in the Ecclesiastical Court, if such were the fact. Instead of that, he contents himself with a feeble protest that the matter was not judicially cognisable at all.²

This is an early application of the venerable maxim that Courts of Chancery entertain jurisdiction where "a plain, adequate and complete remedy" cannot be had in other Courts. It was made a hundred years before the statutes of Elizabeth. Cases must have continually arisen where this principle needed to be invoked. The machinery of the Ecclesiastical Courts was wholly inadequate to provide the necessary relief. We have seen that it could not even enforce the payment of simple contract debts.³ Much less would

¹ This style of argument was not infrequent with the Chancellors. So great a man as Lord Ellesmere indulged in it a century later. He remarked in one case that a usurer and broker might reckon together when they met in hell. *Praxis Almar Curie Cancellarie*, Introduction, p. 47.

² Year Book, 4 H. VII. fol. 5.

³ 1 Spence Eq. Jurisd. 580, section 2.

it have been able to provide for "foundations" in cases of charities; to require investments to be made; to decree the performance of the varied trusts which might be established, or to remove any obstacles which stood in the way. An illustration may be found in the case of *Attorney-General vs. La Roche*.¹ Money was directed by a testator to be laid out in the purchase of land to the use of A. for life, remainder to his first and other sons in tail, remainder to a charity. A. having died, his widow feigned pregnancy. The Master of the Rolls made an order in the nature of a writ *de ventre inspiciendo*, by means of which the fraud was discovered, and the charity preserved. Had such a case arisen before the statutes of Elizabeth, how persuasive would have been the Lord Chancellor's maxim enunciated in the reign of Henry VII., "that no one shall depart from the Chancery without a remedy."

The only remaining inquiry is whether the proceeding by information existed. There appears to be no reason against it. Legacies of a charitable nature were enforced on behalf of unincorporated bodies against the executors. Wherever they assumed the character of trusts, they could be established by the *Court* as such. "An executor is a trustee for the legatee with respect to his legacy, and this is the only reason why he is liable in equity."² The king could use the process of information in trusts of personal as well as of real estate. It is said by Lord Hale, that when a trust of chattels is forfeited to the king, it may be executed by information in the Exchequer or in Chancery.³ Wherever *the heir would be held a trustee for a charity in cases of real estate, the executor would be deemed to sustain the same character in the case of personal property*. The position of the executor differed from that of the heir in this respect; that where no specific directions were given, he held under a "general trust" to dispense for the soul. The jurisdiction over this latter class of cases ceased after statutes had directed the residuum to be distributed among

¹ 2 P. Wms. 591; Mosely R. 191.

² Ward vs. Jekyl, 2 P. Wms. 575.

³ 1 Hale's Pleas of the Crown, 248. This passage serves to explain Porter's Case, before alluded to. The king had his choice of remedies.

the next of kin. There are instances of the enforcement of such general trusts by Chancery in behalf of charities as late as the reign of James I.¹ The Court of Chancery, in exercising jurisdiction over executors, adopted the rules prevailing in the Ecclesiastical Courts.²

It is not necessary to show that the present jurisdiction of Chancery was then fully developed. It is enough if the germ existed from which these doctrines are properly derived. No subject of Chancery jurisdiction was then followed to its legitimate consequences. From what we possess we may infer the residuum as an artist "makes out a statue from an existing torso, or an anatomist constructs a perfect skeleton from the fossil remains of a part."

On the whole, the opinion of Mr. Hargrave must be acceded to, that the right to *prove* a will in the Ecclesiastical Court is exclusive; jurisdiction to enforce its provisions is concurrent with Chancery.³

The imperfect survey taken of this subject may lead to the conclusion that a more exhaustive research into the early authorities than was possible in the preparation of these articles, would show that no class of men have been more truly charitable than those rude men, as we are apt to term them, who lived in the middle ages. It has recently been observed by competent authority, that "the objects of ancient bounty comprised every institution felt to be necessary or beneficial, or capable of relieving the public burdens. They included establishments for instruction, spiritual and secular; endowments to make and maintain causeways, roads and bridges; for assisting the people in the charge of fifteenths and other taxes; for providing arms for the general defence, hospitals for the cure of disease, and for contributing to the support of the poor in every form."⁴

T. W. D.

¹ Tothill, 150-1. 6 Jac. 1.

² Keily vs. Monck, 8 Ridgway P. C. 248; 1 Spence Eq. Jurisd. 582.

³ Hargrave's Law Tracts, 478.

⁴ Report of the Committee of the Society for the Amendment of the Law, 11th London Law Magazine, 805.

[The later authorities have not been specially noticed, because, from the character of these articles, it was mainly desirable to state the results arrived at by historic investigation. For similar reasons, local statutes have not been alluded to. Attention is invited to the very learned and elaborate argument of Hon. Alexander W. Bradford, former Surrogate of the city and county of New York, in the case of *Rose vs. Rose*, Supreme Court of New York. Mr. Bradford's great acquaintance with the civil law gives his researches into the jurisdiction of the Ecclesiastical Courts, special value. See also the argument of Edward O. Parry, Esq., in the case of the heirs of Stephen Girard against the City of Philadelphia, recently tried in the Court of Common Pleas, Philadelphia County, Pennsylvania. Mr. Parry claimed that where a devise or gift to a charity was *in terms* inalienable, so as to take away from the Chancellor the power to order a sale in his discretion, it came within the policy of the law as to perpetuities, and was void.

The following are important legal decisions: *Sonley vs. Clock-makers' Co.*, 1 Brown Ch. Cas. 81; *Incorporated Society vs. Richards*, 1 Drury & Warren 301; *Will of Sarah Zane*, Brightly's p. 346; *Tappan vs. Deblois*, 45 Maine 122; *Baptist Association vs. Hart*, 4 Wheat. 1; *Dutch Church vs. Mott*, 7 Paige 80; *Williams vs. Williams*, 4 Selden 524; *Fontain vs. Ravenel*, 17 W. U. S. 369; *Owens vs. Methodist Episcopal Church*, 4 Kernan 1; *Beekman vs. Bonsor*, 23 N. Y. (9 Smith) 298. The argument of Mr. Noyes in this case, previously mentioned, will be found in Appendix to the volume, p. 575, et seq.

The investigation of this subject leads to the conclusion, that the obscurity of the law should be removed by legislation. There is disposition in England to place the subject on more satisfactory grounds. There is an evident reaction against the policy of the main Acts, which tended to discourage charitable donations. A valuable report has recently been made by the Committee of the Society for promoting Amendments of the Law. The following suggestions were made by the Committee: 1. That hereafter land should be acquired by a charity, except so far as was

necessary for buildings and grounds. The residue of the property should be invested in government or other similar securities.

2. That no license to hold in mortmain should be necessary.

3. That the charity shall be subject to revision at the end of thirty years, and that, if necessary, a new declaration of trusts may be made by a Committee of Public Charities in the Privy Council, following, as near as may be, the original design. 4. That charities shall not be void for uncertainty, or on the ground of the pernicious nature of the objects expressed by the testator. These points are to be established by legislation.¹ To these should be added, in our judgment: 5. That provision should be made, that persons having lawful claims upon a testator's bounty, shall not be disappointed of their reasonable expectations.

It is now time that a definite policy in respect to this subject should be fixed upon in this country. Charitable donations increase rapidly in number and importance. It may be predicted that they will hereafter be looked upon with augmented favor, and that we shall agree with the Law Amendment Committee, that charity cannot be too great, so long as heavy taxation is otherwise necessary to provide for the very objects on account of which the charitable donation is made.

T. W. D.]

MINES—MARIPOSA GRANT.

The time has long since gone by when "*cujus est solum ejus est usque ad cœlum*" defined the extent of the ownership of a landholder, as a maxim of universal acceptance. And regarding *solum* as the surface of the earth, the extent to which the owner might claim property in the opposite direction has in so many cases been limited to a crust of a few feet, beneath which other owners were operating within their own closes, limited and defined like those upon which the sun is accustomed to shine, that in some portions of our

¹ London Law Magazine (1861), Vol. II. p. 305.

own country, as well as of England, an upper and a lower freehold in the same soil have come to be familiar estates to the law. Cases are numerous, of late years, where the surface-owners have had sharp struggles in restraining the mine-owners beneath them from weakening the supports upon which their houses rest, while it is no rare experience for a landowner to see the bottom of his well dropping out, or failing to hold the requisite supply of water, and in whole sections of the country the people upon the upper stratum of the earth must live in constant apprehension of finding themselves involuntary intruders upon those who are toiling and bringing up the hidden treasures of the lower regions.

It is not our purpose, however, to discuss the subject of mines and mining rights in general, but to confine ourselves to those of gold and silver.

From a very early period these have been regarded by the common law of England as belonging to the crown, as a part of the *jura regalia*, whether found in public lands or private estates. The question was examined at great length in the 10th Elizabeth, in a case reported in Plowden, 310-340. The reasoning of Mr. Onslow, as counsel for the queen, in favor of this assumption (p. 315), states the following as one of the grounds, that "the common law, which is founded upon reason, appropriates everything to the persons whom it best suits: as, common and trivial things to the common people; things of more worth to persons in a higher and superior class, and things most excellent to those persons who excel all other; and because gold and silver are the most excellent things which the soil contains, the law has appointed them as in reason it ought), to the person who is most excellent, and that is the king." And, passing from the land to the water, he finds that the king shall, for the same reason, "have whales and turgeons, taken in the sea or elsewhere within the realm," "so that the excellency of the king's person draws to it things of an excellent nature." As many, now-a-days, in the light of the history of the Tudors and the Stuarts, might not agree so readily in this reason for the law as in the fact that it was the law, it will be enough to state it as one of its settled dogmas: 1 Black. 294; 2

Co. Inst. 577. The existence of this right is recognised, together with his right of aliening the same, thereby showing that it was no part of the essential, inherent sovereignty of the king, in the charters granted by the crown to the early colonists of this country. In that of Massachusetts, in 1628, there was granted, among other things, "mines and minerals, *as well royal mines of gold and silver*, as other mines and minerals," the grantees yielding and paying to the crown one-fifth part of the ore of gold and silver which they might obtain. And a similar provision was contained in the Plymouth Charter, granted to Governor Bradford in 1629: 3 Dane. Ab. 187; Anc. Chart. of Mass. 1; Plym. Col. L., Brigham's ed. 21.

It is not known that any practical result ever came of these provisions. But at the time of the Revolution the states of New York and Pennsylvania asserted the prerogative as to mines which had originally been in the crown, as to the lands in the provinces; but in a case in Georgia, it was held that these mines belonged to the owner of the land within which they are found: Willard R. Est. 50; Dunlop's Stat. 90; 3 Kent 378, note. It is stated by counsel, in the argument of *Boggs vs. Merced Co.*, after reciting the cessions of public territory to the general government by Massachusetts, New York, Connecticut, South Carolina, Virginia, and North Carolina, of a region known to be rich in a great variety of mines, that the government never had claimed mines on the land of individuals: 14 Col. 336. It is said that by the civil law mines within the boundary of a private grant originally belonged to the owner of the soil: 14 Col. 337; Coop. Just. 461. But Spain, in derogation of this right, seized upon mines of gold and silver, wherever situate, by royal ordinances, as a part of her jura regalia, by way of eminent domain, thereby reaping the questionable benefit of the treasures of the American colonies.

These laws of Spain extended over California while it formed one of her provinces, and although the value of this right was not then understood, because the extent of these mineral deposits had not then been discovered, yet the principle of property in mines on the part of the state, as well as sovereignty over the territory.

which was an acknowledged dogma under the Spanish administration, led to questions of no small difficulty after that territory had come under the jurisdiction of the United States.

It was conceded, that whatever belonged to Spain in her sovereign capacity, passed to the government of Mexico upon her becoming an independent state; and that whatever of sovereignty belonged to Mexico passed to the United States, by the treaty ceding California to the latter government.

But how far this affected the property in mines of gold and silver, and whether there continued an ownership in these incident to the government, and independent of the ownership of the soil, was raised in various forms, though it seems to have been at last settled in a series of cases, which have arisen in the California courts, which from their magnitude and importance, as well as the ability with which they have been discussed at the bar and by the bench, are deserving special notice. Indeed, they form a new and peculiar chapter in American jurisprudence. And it is among the remarkable circumstances connected with the settlement of that empire state of the West that we have before us, while writing this, parts of the eighteenth volume of the Reports of the Supreme Court of that state, although the territory was first ceded by Mexico in 1848, and that, for the importance and general interest of the questions settled, as well as the learning and ability exhibited in their presentation and decision, as well as the style of execution of the volumes themselves, these volumes compare favorably with those of the Atlantic states of the Union.

One of these cases has acquired a kind of historic interest, aside from the importance and magnitude of the interests involved, from the parties associated with its incidents. We allude to the case of *Boggs vs. Merced Co.*, 14 Cal. 279—380, involving the title to the Mariposa mines, of reputed fabulous amount in value.

We propose to give a brief outline of the history of this case. But before doing so, it should be stated that in the case of *Hicks vs. Bell*, 3 Cal. 219, the Court had determined that the mines of gold and silver found in public lands, as well as the lands of private citizens, were the property of the state by virtue of her sovereignty, giving to her in fact, by right of succession, the same

interest in those minerals as the King of Spain or the government of Mexico had had. In deciding the case of *Boggs vs. Merced Company*, this doctrine was indirectly impugned, though frequently adverted to, and was finally overruled in *Moore vs. Smau*, and *Fremont vs. Fowler*, 17 Cal. 199-226, the latter involving the title to the minerals in the Mariposa grant. It was settled in those cases that the mines passed with the lands in which they were found, and that the United States held them in the same manner as any other public property, not as sovereigns, but as proprietors of the lands themselves. And that, consequently, nothing passed to the state in the mines as incident to its sovereign character.

The important distinction between the law, as it stood under the Mexican authority, and as it was finally construed under that of the United States or state government, was, that upon a grant of lands by the former, these mines did not pass without express words to that effect; whereas, by the latter they did pass, unless expressly excluded by the terms of the grant. The reader may also be reminded that the usual form of evidence of a grant of public lands by the United States, is what is called a patent, answering to a deed of a private proprietor, issued to the person to whom the grant is made.

Another circumstance connected with the idea of the property in the mines being in the state by right of sovereignty ought to be stated, and that is, that it became the settled policy of the state, sustained by legislation, to encourage citizens in exploring for and extracting the minerals from the soil, whereby every explorer stood, in some measure, in the place of the state, with a right paramount to those of the agricultural settler upon lands, who could not, by such settlement and occupation, exclude the operations of miners who were in good faith proceeding to extract the gold from the earth: *McClintock vs. Bryden*, 5 Cal. 97. And the owner of a mining claim had, in practical effect, a good and vested title to the property until his title was divested by the exercise of the higher right of the superior proprietor, the State: *Merced Min. Co. vs. Fremont*, 7 Cal. 327.

These preliminary statements are necessary, to understand the

issues involved in determining the title of General, late Colonel, Fremont to his Mariposa Mines.

The history of this title is briefly this:—In 1844, the then Governor of California granted a tract of land, known as “Las Mariposas,” to the extent of ten square leagues, lying within certain boundaries of a much larger extent of territory, to Alvarado. In 1847, Alvarado conveyed his interest in the tract to Colonel Fremont. In 1848, Mexico ceded California to the United States. In 1849, Colonel Fremont had a survey and map prepared of his grant, and, in 1852, filed his claim before the Board of Commissioners, which had been created to settle the private land claims in California. In December of that year this board confirmed his claim to the extent of ten square leagues, as described in his grant and map. In 1853, an appeal was taken from this decision to the United States District Court in California, where the same was reversed in 1854, and an appeal was taken to the Supreme Court of the United States, where the case was argued by Messrs. Jones, Bibb and Crittenden, for the appellant, and Attorney-General Cushing for the United States. At the December term of that Court, 1854, the Chief Justice gave the opinion of the Court, sustaining the validity of the grant, but expressly waives the question as to any mines within the grant. Justices Catron and Campbell dissented. The Court ordered a re-survey to be made, under the authority of the United States, and remitted the case for final decree to the District Court: *Fremont vs. United States*, 17 How. 542–576. From the action of the District Court, pursuant to this order, an appeal was attempted to be taken again to the United States Supreme Court. But, in December, 1855, that Court granted an order for a writ of procedendo to the District Court to execute the former mandate. The Court further held that the interest of Colonel Fremont being a “floating claim,” it could not be located by a decree of the Court, but must be done by the executive or legislative power of the government: 18 How. 80. This, as it will be perceived, has a very important bearing upon the moral aspect which the case finally assumed in the State Court of California.

In pursuance of this decree, a survey was made under the direction of the Surveyor-General of the United States, of the ten square leagues, and a patent of the same was issued to Colonel Fremont, by the United States, in February, 1856, referring to the various proceedings, and decree of confirmation above stated.

But the question of the greatest importance remained yet to be decided. It had been discovered, since the original grant was made, that the tract embraced in the patent contained gold, in mineral form, of immense value, and, as will be seen, a mine was then being wrought by the Merced Mining Company. And it was earnestly denied that Colonel Fremont had, by these proceedings, acquired any title to the minerals contained within his grant. Among the grounds on which this position was maintained, was, 1st, that all he had acquired by the judgment of the Court was a *confirmation* of Alvarado's title, that this confessedly did not embrace the mines of gold, that these mines had become the property of California, upon her admission as a state in 1850, so that the patent in 1856 could not and did not pass a title to these mines. This question was raised in a proceeding commenced by the *Merced Mining Company vs. Colonel Fremont*, to restrain him from trespassing upon their possessions, and working the mineral veins within the same. This was heard and decided by the Supreme Court of California in April, 1857. The ground of their claim was, that finding the land vacant and unoccupied, they had, in 1851, under the statutes and laws of California, entered upon and worked the mines which they had found there, and had in so doing expended \$800,000 in valuable improvements; that the mine worked by them was two miles outside of the lines of the survey which Fremont had caused to be made as the lines and boundaries of his grant in 1849; that he had suffered them to go on and make those expenditures with a full knowledge of their being made, and had made no objection, and that he was estopped to claim the mine, although now included in the limits of his new survey and patent. All these points were not, it is true, raised in the hearing of the first case, and they have been stated in anticipation to avoid repeating. The application for injunction was successful, and he was

prohibited by the decree of the Court from interfering with or working the plaintiff's mine. The opinion was given by Burnett, J., in which Terry, J., concurred, but Murray, C. J., dissented, on the ground of its not being a case in which the Court ought to interpose by injunction.

In April, 1857, Boggs, the lessee of Fremont, commenced an action of ejectment against the Merced Company to recover the mine in question, which was argued before the Supreme Court of California, and an opinion given in the case in July, 1858, by Burnett, J., in the general grounds of which Terry, C. J., concurred, but Field, J., dissented. The decision was adverse to the plaintiff, on the ground, among other things, that Fremont's title was a mere *confirmation* of that granted to Alvarado, which clearly excluded the minerals, and that the defendants had a right to enter upon and take these from the land.

A rehearing was granted, and the case was again argued in July, 1858, and again in October, 1859, before Field, who had become Chief Justice, and Cope, J., Baldwin, the third Judge, having previously been of counsel in the case. The judgment of the Court was in favor of the plaintiff, and the opinion of the Chief Justice is a full, elaborate, and able examination of the various grounds taken by the eminent and learned counsel engaged in the argument, fully sustaining the legal rights of Colonel Fremont, under the terms of his patent, to the premises in controversy. He examines the allegation as to the original survey, differing from that made by the United States, the latter of which being the only valid and binding one. He holds that the patent issued by the United States was conclusive of the validity of the original grant, and the survey upon which it issued, and was a relinquishment to Fremont of the interest of the United States in the land. He examines the point of the plaintiff being estopped, and maintains that the doctrine did not apply in this case, as his grant, when he made the survey, had not been surveyed and designated by the United States, the only authority which could make it. That the defendants had no title to the land in controversy, except that of a general license to enter upon mining lands, and work the mines therein.

and that this did not extend to lands owned as private property, and therefore, as against the plaintiff in this case, the defendants had no right of possession.

But the question of the property in the minerals was not fully determined until January, 1861, in the case of *Fremont vs. Flower*, 17 Cal. 199, above stated, where it was held that the minerals in the soil belonging to the United States pass with the soil by a grant thereof, and that neither the sovereignty of the United States nor of an individual state extends to the ownership of such metals, and consequently that when the United States granted a patent to Colonel Fremont for ten square leagues surveyed, and thereby indicated and described, they granted to him the minerals as well as the soil. And the title to this celebrated grant, which had proved so fruitful in fees, as well as in the elements from which fees are rendered valuable, seems at last to be settled and at rest.

It would be pleasant, if this article had not become so extended, to dwell for a moment upon the reflections that are at once awakened as one contemplates the various phases of this celebrated case, upon the silent yet resistless majesty of the law, so long as its robes of office are worn by men of learning, uprightness, and unsuspected moral courage, acting within their proper sphere. Here has been a controversy involving, it is said, millions in value, as well as many considerations of great hardship, exciting not a little local as well as personal feeling and animosity. It has been passed upon by three men, personally without power, the organs and officers of the law, and there the contest ends, for the law has spoken, and we are, after all, a law-abiding people.

In the Massachusetts Supreme Judicial Court—Jan. Term, 1862.

WHITHEAD vs. KEYES.

No exception lies to the decision of a judge of the superior court upon the question whether a deposition which has been read in evidence in a trial shall be delivered to the jury when they retire to consider of their verdict.

In an action against a sheriff for an escape suffered by his deputy, the return of a rescue upon the writ is not conclusive evidence in favor of the defendant.

An officer is not bound to call for aid in the service of mesne process, and is not liable for an escape that might have been prevented by his calling for aid.

An officer is bound to use all reasonable and proper personal exertions to secure a person for whose arrest he has a writ; and if, in the opinion of the jury, he has not done so, he may be held liable for an escape, although he used all such exertions as he deemed necessary at the time.

An officer effects an arrest by laying his hand upon a person whom he has authority to arrest, for the purpose of arresting him, although he may not succeed in stopping or holding him.

Tort against the sheriff of Middlesex county, for the default of his deputy.

The facts which appeared at the second trial in the superior court were substantially the same as those which appeared at the first trial, reported in 1 Allen, 350. The objection heretofore taken, that the present action could not be maintained, because the plaintiff did not enter his action against Stoddard, the defendant in the original writ, was renewed; but Putnam, J., overruled it. The deputy returned a rescue upon the writ, and the defendant contended that this return was conclusive, but the judge ruled that it was not conclusive, but was evidence for the consideration of the jury.

The judge also ruled, against the defendant's objections, that certain depositions which had been read in evidence by the defendant should not be delivered to the jury when they retired to consider of their verdict.

The defendant requested the court to instruct the jury that the officer, although he might call for aid in arresting Stoddard, the defendant in the writ, was not bound to do so. The judge declined

so to rule, and instructed the jury that the officer had the power to call for aid, and it was for them to determine whether, under the peculiar circumstances of the case, he ought not to have done so, and whether if he had done so he could have succeeded in detaining Stoddard, and whether or not it showed negligence in not calling for aid.

The defendant also requested the court to instruct the jury that he would not be liable for an escape provided the officer used all such reasonable and proper exertions as he deemed necessary to secure Stoddard. The judge declined so to rule, and instructed the jury that the defendant would not be liable provided the deputy used all such exertions as they should consider reasonable and proper under all the circumstances of the case.

The defendant also requested the court to instruct the jury that if the hold taken of Stoddard by the officer was only for an instant, and Stoddard broke away from that hold by superior force, or was rescued therefrom by the interference of others, this would be a sufficient retaking by the officer to allow him to return a rescue. The judge declined so to rule, and instructed the jury that to enable the defendant to set up a re-arrest of Stoddard by the officer, the hold by the officer would not be sufficient unless Stoddard was held and stopped, or the officer had such a hold of him that it was in his power to stop him.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

D. S. Richardson and *S. A. Brown*, for the defendant.

T. H. Sweetser and *A. F. L. Norris*, for the plaintiff.

METCALF, J.—1. When this case was formerly before the court, (1 Allen, 350), we decided that the averment, in the declaration, that the writ against Stoddard was returnable to the Court of Common Pleas, “as by the record of the same writ, in the same court remaining, more fully appears,” was supported by proof that the writ was returned to the clerk’s office and placed in the files of non-entries. So the reporter understood and stated the decision, as he was authorized by the fact that the point was argued, with

other points, and that the court granted a new trial "upon a single ground," namely, an erroneous instruction given to the jury as to the defendant's liability for an escape; thereby, by necessary implication, overruling the exception which is now brought again before the court. A writ, when returned, is matter of record. 1 Stark Ev. (4th Amer. ed.) 285. Powell on Ev. 298. 1 Greenl. Ev. § 521.

2. It is not a matter of right that depositions used in the trial of a cause shall be delivered to the jury, on their retiring to consider of their verdict. It is matter of discretion, the exercise of which by a judge is not a legal ground of exception. See Graham on New Trials, 80; *Spence v. Spence*, 4 Watts, 168; *Alexander v. Jameson*, 5 Binn. 238.

3. We are of opinion that the judge correctly ruled that the return of Thomas, on the writ against Stoddard, was not conclusive in this action against the defendant for an escape. The defendant relies on the position, often found in the books, that an officer's return cannot be contradicted by parties and privies, except in an action against him for a false return. But we cannot see, on principle, any more reason why his return should be conclusive in this action for an escape—which assumes that the return was false—than in an action directly charging him with a false return. If his return be true, he may prove it to be so, as well in this action as in the other. His return is *prima facie* evidence of a rescue, and the burden is on the plaintiff to prove it false, as well in this action as in the other. And not one of the numerous books cited by the defendant's counsel, nor any case in any English book, shows that an officer's return of a rescue has ever been decided to be conclusive evidence in his favor in an action brought against him for an escape. On the contrary, there are recent English authorities which show that it is not conclusive. It was so decided by Holroyd, J., in *Adey vs. Bridges*, 2 Stark. R. 189. In *Jackson vs. Hill*, 10 Ad. & El. 492, Patteson, J., denied that a return was conclusive in all cases except in an action for a false return, and said: "The case cited from the Year Book" (5 Edw. IV. 1) "is strong to show that a return is conclusive only in the particular

cause in which it is made; and there is no authority the other way." See also Vin. Ab. Return, O. 25; 1 Saund. Pl. & Ev. (2d ed.) 1074; Atkinson's Sheriff Law, 247, 248. Watson's Sheriff, 72. 3 Phil. Ev. (4th Amer. ed.) 701. 1 Taylor on Ev. 702, 703.

If there are any decisions in this country which support the defendant's exception to the ruling on this point, we cannot follow them. We adopt the views of the Supreme Court of Vermont, in the case of *Barrett vs. Copeland*, 18 Verm. 67, which cannot be distinguished, in principle, from the case before us. That was an action for an assault and battery and false imprisonment at B. The defendant pleaded, in justification, that he was a constable of the town of M.; that he arrested the plaintiff at M. on an execution; that the plaintiff escaped, and that he pursued and recaptured him in the town of B. and conveyed him to M. on the way to prison. On the trial in the county court, the defendant gave in evidence the execution and his return thereon, in which he set forth an arrest of the plaintiff at M. as averred in the plea. The plaintiff offered evidence to contradict the return, but it was excluded, and the defendant obtained a verdict, on which judgment was rendered. The supreme court reversed that judgment. "The question," said Royce, J., "now presented is, whether the official return of a public officer is conclusive evidence in favor of such officer, in the prosecution or defence of a collateral action. We find it laid down as undoubted law, that such a return is admissible evidence in the officer's favor; as also to affect the rights of third persons. But these authorities uniformly assert, that when offered for such a purpose, it is but *prima facie* evidence. Its admissibility is put upon the ground of the general credit due to the return of such an officer, in cases where it is his duty to make a return. But, upon principle, it should be subject to contradiction by third persons, because they are neither parties nor privies to the transaction, and because they would not, according to any precedent with which I am acquainted, be entitled to a remedy against the officer for a false return. It should also be open to contradiction collaterally, even by a party to the process. We are therefore of

opinion that the plaintiff was entitled to go into evidence to disprove the alleged arrest at M. And for the rejection of the evidence, offered for that purpose, the judgment of the county court must be reversed." See also *Francis vs. Wood*, 28 Maine, 69.

4. But we are of opinion that the jury were wrongly instructed that they were to determine whether Thomas ought not, under the particular circumstances of the case, to have called for aid in arresting Stoddard, and whether, if he had done so, he would not have secured him, and whether his omission to call for aid showed negligence on his part. Though an officer has authority, yet he is not bound, to call for aid in the service of mesne process, and is not liable for an escape that might have been prevented by his calling for aid, if the party arrested by him rescues himself or is rescued by others. *May vs. Proby*, 3 Bulst. 200, 1 Rol. R. 388, 440, and Cro. Jac. 419. *Watson's Sheriff*, 60. *Griffin vs. Brown*, 2 Pick. 304, 310. *Buckminster vs. Applebee*, 8 N. H. 547. *Sutton vs. Allison*, 2 Jones Law R. (N. C.) 341.

5. We are of opinion that, as to all things except the duty of Thomas to call for aid in the service of the process in his hands, the jury were rightly instructed that it was for them to decide whether Thomas used all reasonable and proper exertions to secure Stoddard, and that this question was not to be decided by the opinion and judgment of Thomas, at the time. But, for the reason already given, the instruction was erroneous, so far as it left the jury at liberty to decide whether Thomas, by not calling for aid, omitted a necessary and proper exertion to secure Stoddard.

6. We are also of opinion that the jury were wrongly instructed that to enable the defendant to set up a re-arrest of the debtor (Stoddard) by the officer (Thomas) the hold of the debtor by the officer would not be sufficient, unless the debtor was held and topped, or the officer had such a hold of him, that it was in his power to stop him.

There cannot be either an escape or a rescue of a person, unless he is first arrested. If an arrest is prevented by a party's avoidance or resistance of an officer, or by the interference of others, the party does not escape, and the officer is not liable in an action for an escape, but is liable, if at all, in an action for negli-

gence in not making an arrest when he might and ought. And the law is the same in regard to a rescue. An officer cannot legally return a rescue of a party whom he had not arrested. Such a return would be false. We have therefore, in deciding on this last instruction given to the jury, to consider the question—what constitutes an arrest? And our opinion is, that an officer effects an arrest of a person whom he has authority to arrest, by laying his hand on him for the purpose of arresting him, though he may not succeed in stopping and holding him. 1 Hale P. C. 459. *Genner vs. Sparks*, 6 Mod. 173, and 1 Salk. 79. *Sheriff of Hampshire vs. Godfrey*, 7 Mod. (Leach's ed.) 289. *Williams vs. Jones*, Rep. Temp. Hardw. 301. Bul. N. P. 62. *Watson's Sheriff*, 90. *United States vs. Benner*, Bald. 239. And we need not express an opinion as to what else will or will not amount to an arrest. We think that the instruction, prayed for on this point, by the defendant, should have been granted, and that the exception taken to the instruction that was given must be sustained.

New trial granted.

1. The law of arrest, which seems simple, has been, first and last, a good deal debated, and the decisions upon the subject are not altogether harmonious. In regard to the first point decided by this case, there seems no good ground of question. To hold the return of the officer *prima facie* evidence of the truth of the facts contained therein, is nothing more than giving him the advantage of that presumption which every public officer is entitled to claim in his favor, that he has performed his duty, until the contrary is shown. And to ask any further immunity, as that his return shall be held conclusive between the parties, would lead practically to the absurdity, that an officer could not be made liable even for a false return, which is carrying the matter further than has ever been done, so far as we know. The return of an officer has been held conclusive of the facts stated therein, so far as the particular action is concerned, in many of the Ame-

rican states, and not liable to be contradicted by a plea in abatement. But this is a rule of convenience merely, and tolerable only upon the ground that the officer is liable to either party for all damages sustained in consequence of any false return made by him, by an action founded directly upon the malfeasance.

2. In regard to the re-arrest, the case is quite susceptible of the view taken in *Cooper vs. Adams*, 2 Blackf. 294, "that the arresting of a prisoner and the retaking him on fresh pursuit, after an escape, make but one effective arrest." But, in considering the recaption it is certain nothing more is required than what was necessary to constitute an arrest in the first instance. And this consists chiefly in having the proper authority, and in properly asserting it, when the prisoner is within the power of the officer. After this the defendant is bound to submit, and if he will not, but forcibly break

away, it is one form of rescue, and may be so returned.

As is said by Holt, Ch. J., in *Atwood vs. Burr*, 7 Mod. 3, 8, "If a window be open, and a bailiff put in his hand and touches one for whom he has a warrant, he is thereby his prisoner." But if the person is never in the power of the officer, it is not an arrest, even if he touch him, as he might do, when not in a situation to control his movements. As if he said to one on horseback or in a coach, "You are my prisoner," and even touch some part of his person, if he nevertheless drive off, it is no arrest, for he was not in his power. But if the person thus approached do submit himself to the power of the officer, it is a good arrest. *Horner vs. Battyn*, 12 Geo. 2; B. N. P. 62; 1 Ventris, 306.

But it is certainly not regarded as requisite, at the present day, that the officer should touch the person to constitute an arrest, as asserted in *Genner vs. Sparkes*, 1 Salk. R. 79; S. C. 6 Mod. 173. This doctrine is reiterated by Woodsway, J., in *Huntington vs. Blaisdell*, 2 New H. R. 818, as still being sound law. But this view is abandoned in most of the modern cases. *United States vs. Benner*, 1 Bald. R. 234; *Gold vs. Bissell*, 1 Wend. R. 215. Some such view as this seems to be upheld in *Hollister vs. Goodale*, 8 Conn. R. 382, but that case is denied to be law even in regard to the attachment of personal property. *Lyon vs. Rood*, 12 Vt. R. 283, and cases cited; and it is certain no such rule could be maintained, either in regard to the arrest of the person or the attachment of personal property.

In the important and leading case of *Blatch vs. Archer*, 1 Cowp. R. 63, it was held that a mere servant of the bailiff might make a good arrest, although thirty rods away from the bailiff and not within the view of such officer. But

both the officer and his assistant must be then occupied in the purpose and pursuit of such arrest. It will not do for a stranger, or the party even, to take a person and carry him by force, where the officer can be found. *Hall vs. Roche* 8 T. R. 187; *Wilson vs. Gary*, 6 Mod 211.

The cases which have questioned the legality of an arrest, where the party was put under no physical restraint, but, upon being informed that the officer had a capias, submitted to his control, are certainly not defensible. *Arrowsmith vs. Le Mesurier*, 5 B. & P. 211. It is true, no doubt, that if the person resist, and is never in the power of the officer, that is, where, if he had strength, he might have controlled him, it will not constitute an arrest. As when the person, on being informed that the officer had process against him, snatched up a pitchfork and kept off the officer, threatening to kill him if he came nearer, and thus retreated into his house, and shut the door against the officer, it was held no good arrest. *Genner vs. Sparks*, 6 Mod. R. 173. But, as is said by Lord Hardwicke, in *Williams vs. Jones*, Cas. temp. Hardw. 201, 2 Str. 1049, "If a bailiff comes into a room and tells the defendant he arrests him, and shuts the door upon him, there is an arrest, for he is in custody of the officer." And the same is equally true if he is near enough to the person to lay his hand upon him and inform, or in any way give him to understand that he has process and arrests him. It thereby becomes the duty of such person to submit to his authority; and his forcibly going at large is a rescue of himself, and, as such, punishable by indictment. *Sir James Wingfield's Case*, Cro. Car. 251, who was fined £500, and his abettors £200, £180, and 500 marks each, for such an offence.

There can be no question that, in a case like the present, it was the duty of the person arrested to submit to the control of the officer, even if nothing had occurred before he took him by the wrist in entering the cars. And his forcibly breaking away from him and escaping from the cars, was an obvious rescue of himself, and properly returned as such. The only doubt which can be fairly raised in regard to the case, in our view, is, whether the officer, having such abundant opportunity to call to his aid the bystanders, who, by express statute, are required to assist in the arrest, he should not have done so.

From the opinion of the judges of the Court of Common Pleas, in *Howden vs. Standish*, 6 Com. B. R. 504, it is evident that the early cases, such as *May vs. Proby*, Cro. Jac. 419, 8 Bulstr. 198, 1 Roll. R. 388, and *Crompton vs. Ward*, 1 Strange, 429, wherein it is held, that if an officer arrest a person upon mesne process, and he rescue himself, or his friends rescue him, the officer is excused, are understood to have had reference to such cases as the officer might be called upon to act in suddenly, and where he could not readily have obtained aid. This is the reason urged in the English books, and in these early cases. The distinction which has so long obtained upon this point, between mesne and final process, making the officer liable in the former and not in the latter, is founded upon this presumption.

In the case of *Howden vs. Standish*, *supra*, Rolfe, B., who presided at the trial, instructed the jury that when, as in the present case, the officer was called upon to execute mesne process of *capias*, under circumstances likely to provoke resistance on the part of the defendant and his friends, it was his duty "to be provided with a force sufficient to overcome any degree of resistance that might

be offered to the execution of the process, and that, if necessary, it was his duty to call upon the *posse comitatus* to assist him in the theatre." That was a case where the officer had process against an actor, whom the company had conspired to defend against the arrest. The defendant while upon the stage was pointed out to the officer, but he did not attempt to arrest him. The full bench evidently concurred with the opinion of Baron Rolfe, but the case turned upon a point in the pleadings.

In delivering the opinion of the full court, Coltman, J., said, "The question here is, whether he (the officer) is not bound to provide such a force as will enable him to effect a caption in spite of every such resistance as he has reason to anticipate;" and after citing the early cases, and commenting upon *Crompton vs. Ward*, concludes: "The reasoning of this case seems to establish the principle laid down by the learned judge [Baron Rolfe], that the sheriff is bound to provide such a force as will enable him to effect his caption, in spite of any resistance which he has reason to anticipate." And this is the case of mesne process.

The judge then goes on to argue, that allowing the sheriff to return a *rescues* mesne process is "an exceptional case, being matter of indulgence to the sheriff, who cannot always have the *posse comitatus* with him, in consequence of the possibility that he may be taken unaware and called upon to execute the writ when he has no sufficient force;" and, as the learned judge argues, all the cases show that this indulgence to the sheriff "ought not to be extended," and that he is bound to provide against "a resistance which he had reason to anticipate, and with reference to which he was not taken unawares." It seems to us that the reasoning of this case, which is the latest de-

termination of the English courts in regard to the point, so far as we have been able to find, might have led to the conclusion that, when the officer has at his command all the assistance he could desire or possibly need, he was at least, as a careful and considerate officer, resolved to execute the process effectually, bound to command such assistance as was at his disposal. But the cases have not,

perhaps, gone this length; and in favor of officers we certainly should be content to allow all indulgence consistent with good faith, and the decision takes, perhaps, the safer view upon this point, and clearly so upon the main point involved. The case is one of considerable interest to the profession.

I. F. R.

In the Supreme Court of Pennsylvania, Eastern District, Philadelphia, March, 1862.

JOHN C. CLARK vs. JOHN L. MARTIN.

H. being the owner of two city lots, one a corner property, and the other adjoining it, granted and conveyed the corner lot to D. and R. in fee; reserving a perpetual ground rent, upon the express condition that the grantees, their heirs and assigns, should not erect any building upon the back part of the lot higher than ten feet. H. at the time, and for some years afterwards, occupied the adjoining property as his residence. By five several mesne conveyances all made subject to the condition, the corner property became vested in M. in fee; H. having some years prior to the conveyance to M. granted to the then owner permission to raise his back building to the height of eleven feet, expressly stipulating that such permission should not prejudice or impair the condition. H. died seised of the adjoining property, and also of the rent reserved out of the corner lot. His testamentary trustee granted and conveyed the adjoining property to C., no mention being made in the deed of the restriction imposed on the corner property. M. subsequently by sundry mesne conveyances became the owner of the rent reserved, which thus merged; and M. threatened to build in entire disregard of the restriction. C. filed a bill in equity to restrain him, and applied for a special injunction which was refused; and M. went on and erected a three story back building. Held, upon appeal from the decree of the court below, refusing the injunction and dismissing the bill:

1. That although the clause imposing the restriction was a strict condition in law, yet equity would only inquire into the substantial elements of the agreement, and would enforce it for any party, for whose benefit it appeared to be intended
2. That the duty of the defendant not to build in violation of the condition was clear; and that this duty was not reserved as a mere personal obligation to H. the original grantor, his heirs and assigns; nor for the benefit of the ground rent; but that it was for the benefit of the adjoining property then owned by H. .

and created an obligation to the owner of that property, whoever he might be; and equity would interfere to enforce and protect his right.

- 3 That a general plan of lots need not be shown; such a plan is only one means of proof of the existence of the right and duty; and this may appear as well from a plan of two lots, as of any greater number.
4. That the release of a part of a condition only operates as a release of the whole, where forfeiture of the estate for a breach of the condition is demanded, equity will enforce the condition in its modified form in favor of a party who asks only compliance with the agreement.
5. That the defendant having built in violation of the condition, after bill filed, the complainant was entitled to a decree of abatement without amending his bill.

Appeal by complainant from the decree of the Supreme Court at Nisi Prius, dismissing his bill with costs.

The defendant, at the time the bill was filed, was the owner of a "three-story brick messuage, with the one-story back building or dining-room thereto attached," and lot at the southwest corner of Eighth and Locust streets, in the City of Philadelphia, twenty-two feet six inches front on Eighth street, and one hundred feet deep on Locust street, to a ten feet wide alley. The complainant has been since 1851, the owner of the dwelling-house and lot immediately adjoining to the south, and of the same front and depth. Both lots originally formed parts of a larger lot, which, prior to 1814, was owned by Alexander Henry. July 7, 1814, Henry conveyed the corner lot (now defendant's) to Charles Drosddorf and Lewis Roberts, as tenants in common in fee (reserving thereout to said Henry in fee, a yearly ground-rent of \$225), "upon this express condition, nevertheless, that the said C. D. and L. R., their heirs or assigns, shall not build or erect, or permit or suffer to be built or erected, on any part of the hereby granted lot of ground, beyond the distance of sixty-five feet from the said Eighth street, any buildings whatsoever, other than privies, milk or bathing houses, and walls or fences not exceeding the height of ten feet from the level of the ground, nor erect any building whatever between the dwelling-house to be erected fronting on said Eighth street, and the aforesaid distance of sixty-five feet from the said Eighth street, other than such as shall merely be for the accommodation of the said dwelling-house." The ground-rent was redeemable at any time within seven years, by payment of \$3,750.

Henry died August, 1847, never having parted with said ground-rent or the dwelling-house and lot adjoining the corner. In 1816, Drosddorf and Roberts conveyed the corner property to James Dundas in fee, subject to the ground-rent, and also to the restriction. In January, 1838, Dundas conveyed to Andrew D. Cash in fee, said house and lot, subject to the ground-rent, and also to the restriction. Prior to April 30, 1839, Henry had, as a matter of courtesy merely, without any consideration, consented that Cash should erect a dining-room on said lot eleven feet in height, but refused to allow the restriction to be interfered with beyond the building of the dining-room eleven instead of ten feet high.

Henry, by deed dated April 30, 1839, indorsed on Cash's deed for the corner property, after reciting that Cash had with his consent, previously built a dining-room on the lot, of eleven feet in height, granted to Cash in fee, in consideration of one dollar, the right to continue and maintain the said dining-room of said height forever. "Provided, however, that nothing herein contained shall be so construed, as in anywise to impair, prejudice, or affect the condition and restriction in the said within indenture particularly recited and set forth, in relation to building on the within described lot."

"Mr. Henry's opinion was, clearly, that it would be a great injury to the other property adjoining to the south, if the restriction on the corner lot was violated." The additional foot in height to Cash's dining-room was not regarded as material, and as an act of courtesy Mr. Henry permitted it.

Cash conveyed the corner property May 1, 1839, to Ashhurst, subject to the ground-rent, and restriction "except so far as modified and changed by" the last recited deed. Ashhurst owned the property at the time of Henry's death.

In August, 1847, Henry died, seised in fee of said ground-rent of \$225, and also of the lot, with a dwelling-house thereon erected to the southward of and immediately adjoining the corner property.

By his will he devised said dwelling-house and lot adjoining the corner, in trust with a power of sale. He also authorized his

executors to assign and convey his ground-rents in payment of legacies.

Said executors by deed dated August 14, 1848, granted and assigned said ground-rent of \$225, to Mrs. Martha H. Chambers in fee, in part payment of a devise to her under the will.

In May, 1849, Ashhurst conveyed the said corner property, by the description of "all that three-story brick messuage, *with the one-story back building or dining-room thereto attached*, and the lot of ground, &c., to John Buddy in fee, subject to the ground-rent, and also to said restriction.

The surviving trustee under Mr. Henry's will, by deed dated April 7, 1857, conveyed said dwelling-house and lot, adjoining said corner lot to the southward, to complainant.

In February, 1858, Buddy, conveyed said corner property, subject to said ground-rent and also to said restriction, to John L. Martin, the defendant, in fee.

Mrs. Chambers died in March, 1860, seised in fee of said ground-rent of \$225, having first made her will, the executors named in which, by virtue of certain powers therein given, granted and assigned said ground-rent to John L. Martin, the defendant, in fee, whereby the same merged and became extinguished.

The bill, after setting out the title of the respective properties, alleged that complainant, as the owner, by title from Alexander Henry, of the dwelling-house and lot adjoining the said corner premises on the south, was entitled to the full benefit and privilege of said restriction; that his back-buildings face north, and the maintenance of the restriction was absolutely necessary for proper enjoyment of his property, since, if the restriction be infringed or broken, the health and comfort of the occupiers of said property will be irreparably injured; that, by means of the restriction, the light and air have access from Locust street, across the corner lot, to complainant's premises. That, on the western side of said ten-foot wide alley, the wall of the Musical Fund Hall rises to the height of a three-story dwelling-house; and, unless the restriction is enforced upon the corner lot, it may be built upon the full width to its entire depth to said alley, and without limit as to height, and

thus complainant's property be shut in, leaving only an arrow well for access of light and air, and the health and comfort of the occupants, and the property itself, be greatly injured; that it was the intention of defendant to build on the corner lot, without regard to the restriction, under pretence of a right so to do, and prayed an injunction to restrain defendant, his agents, &c., from infringing said restriction, and for general relief.

The answer admits the allegations of the bill as to the title to said two lots of ground and dwelling-houses now vested in the complainant and defendant respectively.

But alleged that in the deed from Henry to Drosddorf and Roberts for the corner property, there is no remedy or penalty prescribed for breach of said condition, nor any covenant on the part of the grantees to perform it; that said Alexander Henry laid out the large lot mentioned in the bill prior to the conveyance to Drosddorf and Roberts, according to a plan given in the answer; that said Henry did not, by his will or otherwise, give and devise to the trustees, to whom he devised the premises adjoining the corner, any right, title, or interest, in or to the condition in the deed to Drosddorf and Roberts; that the grant and assignment from Henry's executors to Mrs. Chambers conveyed the said ground-rent of \$225 to her, "together with the reversions and remainders of the premises, and all the estate, right, title, interest, property, claim, and demand whatsoever, which was of the said Alexander Henry, as well at law as in equity, of, in, and to the same, and of, in, and to the lot of ground whereout the said rent is issuing and payable;" that said surviving trustee did not in any way grant or convey to complainant any right, title, or interest, in or to said condition in the deed to Drosddorf and Roberts; that the executors of Mrs. Chambers, by their deed to the defendant, conveyed to him the said ground-rent, "and the reversions and remainders thereof, and all covenants for payment thereof, and all the estate, right, title, interest, property, claim, and demand whatsoever, which was of the said Martha H. Chambers, at and immediately prior to the time of her decease, of, in, and to the same, and of, in, and to the said lot of ground whereon the same was so as aforesaid charged;" denied

that complainant is entitled to any benefit or privilege of said restriction in the deed to Drosddorf and Roberts; or that the enforcing of said restriction is necessary for the proper enjoyment of complainant's property, or that the health and comfort of its occupants or the value of the property would be injured and damaged, if the restriction be not maintained; and admitted that he intended to build without regard to said restriction, as follows, to wit: "At the rear end of said dwelling, and attached thereto, a piazza, extending in height from the ground to the eave of the roof of said dwelling, enclosed on the south side with a nine-inch brick wall and open to the west, and extending about eight feet westward; and also, at the distance of about fifteen feet westward from said dwelling, a back-building, to be connected with said dwelling by a stairway on the side next to Locust street, and to be in width from said Locust street nineteen feet four inches, and in depth westward forty-four feet, to the ten-foot wide alley, and nearly as high as the eave of said dwelling, leaving on the south, along the entire length of said back-building, a space of three feet two inches between its face and his party line on the south, and a clear space, between said back-building and complainant's back-building, of eleven feet," and alleged that at the time of the deed to Drosddorf and Roberts, that part of the City was almost exclusively occupied by dwellings; that since then, places of business have been advancing into that neighborhood, and he desired to improve his property in such manner as to conform to advances of business, that he might enjoy its first fruits, and not be deprived of them by the diminution of its value as a mere place of residence.

It appeared, from the proofs taken before an examiner, that complainant had known of the restriction before he purchased the property adjoining the corner from the surviving trustee under Henry's will; that the trustee had no doubt but that the purchaser of that property would be entitled to the benefit of the restriction upon the corner property; but at the same time was unwilling, as the will made no mention of the restriction, and he was acting in a fiduciary character only, to execute a deed containing an express grant of the benefit of the restriction; that, in consequence of this

unwillingness, complainant, at the joint expense of himself and said trustee, obtained the opinion of eminent counsel that the purchaser would be entitled to the benefit of the restriction as appurtenant to the property, of which benefit he could not be deprived by any act on the part of any other representative of Henry ; and that upon this opinion complainant took his deed from the surviving trustee, without any express grant of the benefit of the restriction.

A motion for a preliminary injunction upon the bill, affidavits, and counter affidavits, having been denied prior to the filing of the answer, the defendant immediately went on and erected a building in violation of the restriction, after the intended plan set out in his answer. When the case came up for hearing on bill, answer and proofs, the bill was dismissed *pro forma*, without argument, and the complainant took this appeal.

S. C. and S. H. Perkins, for appellant.

The restriction must have been imposed for the benefit of the property now held by complainant. There is no other purpose for which it can be supposed it was intended. Complainant knew of its existence, was careful to be assured of his right to it before purchasing ; and its advantage must have entered into the consideration he paid. Defendant never paid for its release or extinguishment. The general terms of the release of the ground-rent must be restricted by the recitals: *Rapp vs. Rapp*, 6 Barr, 48 ; *Kirby vs. Taylor*, 6 John. Chanc. 251 ; *Jackson vs. Stackhouse*, 6 Cowen, 122 ; *Cole vs. Gibson*, 1 Vesey, Senr. 504. It was the estate in the ground-rent alone which became merged ; and even if it be conceded that the restriction is annexed to the estate in the rent it is not merged. *Preston on Merger*, 454.

The clause imposing the restriction, notwithstanding the words "upon condition," is not necessarily to be treated as a condition. It is a covenant, or agreement ; or if not a covenant, creates an easement for the benefit of the adjoining property ; and the only property which it adjoins is that now owned by complainant. A clause will never be construed as a condition, when its language can be resolved into a covenant. *Paschall vs. Passmore*, 15 P. S. R.,

3 Harris, 307. See also *Cromwell's Case*, 2 Co. 71, a; Touchstone, p. 122. Any words which import an agreement will make a covenant, 3 Com. Dig. 268, Covenant A. 2. And see *Hoyt vs. Carter*, 19 Barb. S. C. Rep. 212. The complainant, even if unable to bring an action of covenant, is yet entitled to the aid of a Court of Equity to enforce the covenant or agreement made for the benefit of the estate which he now owns. *Blecker vs. Bingham*, 3 Paige Ch. Rep. 246; *Barrow vs. Richard*, 8 Id. 351; *Bronner vs. Jones*, 23 Barb. S. C. Rep. 153; *Tulk vs. Mozhay*, 2 Phillips Ch. Rep. 774; *Biddle vs. Ash*, 2 Ashmead, 221; *Mann vs. Stephens*, 15 Simons Ch. Rep. 377; *Miller vs. Hill*, 3 Paige Ch. Rep. 254; *Whatman vs. Gibson*, 9 Simons Ch. Rep. 196; *Cole vs. Sims*, 28 Eng. L. & Eq. Rep. 584; *Talmadge vs. East River Bank*, 2 Duer Rep. 614; *Hodson vs. Coppard*, 7 Jur. N. S. 11.

The interference of equity may be justified on the ground of compelling specific execution of a contract. *Scott vs. Burton*, 2 Ashmead, 324; *Barret vs. Blgrave*, 5 Vesey, 555; *Stuyvesant vs. The Mayor &c. of New York*, 11 Paige Ch. Rep. 414; 1 Smith's Leading Cases, 5 Amer. edit. Hare & Wallace's notes, 145.

The additional one foot in height allowed as a modification of the restriction was not material; and in no way changes or affects the restriction, or the relative position of the properties; *Duke of Bedford vs. Trustees of the British Museum*, 2 Myl. & K. 552, so as to render the interference of equity for its enforcement improper.

The defendant is estopped from denying the existence of the restriction just as he found it in force when he purchased the corner property. It is a case of *estoppel in pais*. *Pickard vs. Sears*, 6 Ad. & El. 469; *Gregg vs. Wells*, 9 Id. 97; *Freeman vs. Cooke*, 2 Exch. Rep. 663; *Hamilton vs. Hamilton*, 4 Barr, 194; 2 Smith's Leading Cas. 5th Amer. edit., 649, 658; *Waters' Appeal*, 35 P. S. R., 11 Casey, 523; *Dezell vs. Odell*, 7 Hill, N. Y. 219; *Wood vs. McGuire*, 15 Georgia, 202; *McCravey vs. Remson*, 19 Alabama, 430.

Thos. S. Smith and *Wm. L. Hirst*, for defendant. The clause in the deed from Henry to Drosddorf and Roberts is a condition. It follows immediately after the grant without dependence on any other sentence of the deed; the words are the words of the grantor, and not of the grantees; and are compulsory on the grantees *not* to do an act; Co. Lit. 201, a. The condition is repugnant to the grant, and therefore void. Smith on Real and Personal Property, 62; 2 Crabb's Law of Real Property, 795, sec. 2132; Littleton, sec. 360; Co. Lit. 223, a; Bac. Abr. Title, Condition L.; Touchstone, 131-2. There was a reservation of a ground-rent; and a covenant on the part of the grantor for quiet enjoyment so long as the grantees paid the ground-rent.

If not void, the condition was extinguished by the verbal permission given to Cash to build in disregard of it. Smith, Real and Pers. Property, 54; Touchstone, 159; *Goodright vs. Davies*, Cowp. 803; *Dickey vs. McCullough*, 2 W. & S. 88, c. The grant by deed from Henry to Cash, was either an apportionment of the condition, or a release of the condition upon condition, and in either case the condition was wholly discharged. If an apportionment, 2 Crabb's Real Property, Title, Condition; *Winter's Case*, Dyer, 309; 1 Inst. 215, a; *Knight's Case*, 5 Co. 55, 58; Touchstone, 159; *Dumpor's Case*, 1 Smith's Lead. Cas. 15; 1 Roll. Abr. 471; *Brummell vs. McPherson*, 14 Ves. 173; Co. Lit. 297, b., 215, a. If a release of condition upon condition, Co. Lit. 274, b.; Com. Dig. Title, Condition, a, 8; 2 Crabb's Real Property, 805; *Dumpor's Case*.

If neither void nor released, the condition goes with the estate in the rent, and the rent being extinguished upon its purchase by the defendant who owned the lot out of which it was reserved, the condition is also extinct by merger.

It was personal to the grantor. There is nothing in the line of complainant's title giving him the benefit of the restriction. Nor is there anything in the deed creating it, to show that it was intended for the benefit of the adjoining property.

There was no general plan of building and mutual agreement and obligation, as in *Talmadge vs. East River Bank*, and *Cole vs.*

Sims. No specific appropriation of the condition for the benefit of complainant's property as in *Hills vs. Miller*.

The defendant is a purchaser without notice of any intended benefit to the adjoining property from the condition. *Talk vs. Moxhay*; *Hills vs. Miller*; *Hilner vs. Imbrie*, 6 S. & R. 401; *Frost vs. Beekman*, 1 John. Ch. Rep. 298.

The opinion of the court was delivered by

LOWRIE, C. J.—In 1814, Drosddorf and Roberts bought the corner lot from Alexander Henry subject to a perpetual rent, and with the condition written in this deed, that they, their heirs and assigns, should not erect any building on the back part of it higher than ten feet. Henry being then the owner of the lot adjoining on the south. The corner lot afterwards passed successively to five different owners, the last of whom is the defendant Martin, and in all the deeds the same condition is repeated; so that Martin himself in 1858 purchased on these express terms. Of the adjoining lot, Alexander Henry died seised, and in 1851, his testamentary trustee conveyed it to the plaintiff Clark; and the rent reserved on the corner lot by Henry was purchased by Martin in 1860. Our question is, has Clark as owner of the adjoining lot, any such right to the condition or terms imposed upon Martin's title as entitles him to claim in equity that Martin shall be compelled to observe them? We think he has.

In a proceeding in the common law form it would be necessary to inquire into the form in which the right is reserved, in order to decide whether it should be sued for as a condition, or a covenant, or as a simple contract; but in the equity form of proceeding we inquire only into its substantial elements; what duty does it assure, and to whom?

Here the duty of the defendant is so plain that one may read it running; it is clearly inscribed on every link of the chain of his title to the lot. He took his title expressly on the terms already briefly mentioned. He was not to erect on the back part of his lot any building higher than ten feet, afterwards changed to eleven. To whom then does he owe the duty? No one doubts that it is to

the grantor who reserved or imposed the duty, and to his heirs and assigns.

But did the grantor reserve this duty to himself his heirs and assigns as a mere personal duty, and thus retain in himself, or them, the vain right of saying that lot is not mine, but the owner is subject to my pleasure in the mode of building upon it?

Common sense forbids this, and the law would not allow itself to be troubled with such vain engagements. It is not pretended that this restriction was intended for the benefit of the ground-rent reserved by Henry. And such a pretence would be entirely unreasonable for a restriction that diminishes the value of the lot and of the houses that may be erected on it, cannot increase the security of the rent issuing out of it.

We have no other resource, therefore, than to attribute the restriction to the purpose of benefiting the adjoining lot, then owned by Henry.

Common sense cannot doubt its purpose, and thus it becomes plain that the duty created by the condition and restriction is a duty to the owner of the adjoining lot, whoever he might be.

Very plainly, also, it is a duty that admits the right of the owner of the adjoining lot to have the privilege or appurtenance of light and air over the defendant's lot, and that admits this to be so far subject or servient to that, that the buildings on this must, for the benefit of that, be so limited in height, according to the condition in the deeds.

So such stipulations are always regarded when a form of remedy is selected and allowed, which can admit of treating the case according to the very substance of the contract.

The remedy asked for here is just such a one, under the law authorizing the courts in equity form, to prevent or restrain "the commission or continuance of acts contrary to law and prejudicial to the interests of the community or the rights of individuals." And so abundant are the instances in the administration of equity wherein this very duty has been specifically enforced, that a reference to the cases may very well stand instead of a discussion of the question : 2 Ashmead, 221, 335 ; 2 Harris, 186 ; 3 Prige, 246,

254; 2 Phillips, 774; 15 Simons, 377; 7 Jurist, (1861, Rolls Court,) 11; 2 Mylor & R. 552; 11 Prige, 414; 8 id. 351; 2 Duer, 614-28; Barbour, 153; 23 Law Reports, 401, (*Whitney vs. Union Railway Co.*, 1860, Superior Court of Mass.); 23 Eng. L. and Eq. R. 584; 9 Simons, 196.

It was objected at the argument that this remedy applies only as a means of compelling an observance of the terms involved in a general plan of lots; and this element actually exists in about half of the cases just cited; yet they are not decided on that consideration. It is not because a plan is deranged that the court interferes, but because rights are invaded, or about to be; and this fact may exist in a plan of two lots, as well as in one of two hundred. The plan often furnishes the proof of the terms on which sales were made; but the fact of the alleged terms is as effective when proved by a single deed as when proved by a plan.

It is objected, also, that the restriction relied on here, is in the form of a condition, and that it was released by the release of part of it. But this, if true, in such a case, would apply only where a forfeiture of the defendant's estate for a breach of the condition is demanded. Equity does not so treat the case where mere obedience is demanded. And here, at the very time when part of the right was released, the right to the remainder was expressly continued or renewed. The right is very clearly defined, and it is no more inconsistent with the grant of the fee simple than any other right of easement is, and the plaintiff is entitled to a decree in his favor. The breach of the contract and the amount of injury done are plainly sufficient for this: 12 Harris, 159.

It appears by the evidence that, since this suit was brought, the defendant, in disregard of the suit, has gone on and erected the building. This was very wrong, and puts the court into a very painful position. Our decree in equity is not so severe as a judgment at law would be in ejectment for a breach of a valid condition in such a case, for it does not forfeit the house and lot: 8 Pick. 284. But the abatement of part of a house is so unusual, and so seldom that persons put themselves into such a position as to make such a decree necessary, that we have great reluctance in so decreeing, and

have hopes that the parties may come to some reasonable terms. However, our duty is very plain, and the defendant, by disregard of his contract, and by recklessness in building, pending the suit, has brought the evil on himself. Under the general relief clause, the plaintiff can have a decree of abatement, without any amendment to his bill by reciting the fact of the erection pending the action.

Let the decree be drawn in favor of the plaintiff, with costs.

The subject of the validity and method of enforcing restrictions on the use of real property which are generally contained in building leases, and often in freehold conveyances, is one of growing importance, though it has not yet been very extensively discussed in this country. That a great advantage not only in comfort but in health is gained in large cities, by the construction of blocks of buildings on an uniform plan, and with sufficient spaces devoted to the supply of light and air, is beginning to impress itself forcibly on the public mind. The exclusion from such localities of particular trades, which though not technically nuisances, are often in effect such, is almost equally to be desired. The old fashioned way in which villages straggled up into towns, each man planting his house or his shop where it best suited his caprice or his convenience, has been found to result in tortuous and cramped streets, with bad ventilation and imperfect drainage, fruitful of endemic disease. To some extent and in some places this is now remedied by municipal regulation, but much must be left to individual efforts, and to that practical foresight which is the attendant on private enterprise. There would certainly be great cause for regret if there were any imperative doctrines of law which precluded the use of such restrictions, as those to which we have referred, or confined them to a mere per-

sonal advantage, available only as between the original parties creating them.

At common law, unfortunately, there were such doctrines, which, as a branch of the rule that rights of action are not assignable, would paralyze a large class of restrictions. By the statute of 32 Henry VIII., no doubt, a considerable extension of remedy was given, where the qualification of ownership was expressed in the form of a covenant. But the decisions on this statute present so many technical refinements, as to what are and what are not covenants "running with the land," and are so much occupied with discussions about words rather than things, that the real intentions of the parties are often disappointed. Besides, the statute does not, in general, extend to conveyances in fee simple, which, of itself, excludes every important class of cases. See the authorities discussed in the notes to *Spencer's Case*, 1 *Smith's Lead. Cases*, 5 Am. Ed. 115. And the law still remains unchanged (except in one or two states), in respect to conditions, in which form building restrictions are often expressed, which, being in defeasance of the estate, are construed with the greatest strictness, while, at the same time, they are held not to pass to an assign, nor to be divisible or capable of a partial dispensation: *Dumpor's Case*, 1 *Smith's Lead. Cases*, 5 Am. Ed. 35, and notes.

When, however, we turn to the reme-

dies afforded by a Court of Equity, we enter upon a very different order of ideas. There, rights of action are, as a general rule, held to be assignable for a valuable consideration, as of course, and without the help of any statute. And the intention of the parties to the instrument or transaction by which these rights were created, so far as it can be fairly gathered from the language used, interpreted by the light of surrounding circumstances, is looked at, without regard to the technical effect of particular words or phrases. Applying these principles to the matter in hand, it is now settled, in England at least, that wherever parties to a sale or lease of real estate agree that the property dealt with shall (in a reasonable way) be burthened or affected in its incidents or mode of use, for the benefit of other property of the grantor or lessor, this amounts to a contract which equity will specifically enforce, whether it has been expressed in the shape of a formal covenant, has been inverted into a condition, or has been left to be discovered from the circumstances attending the transaction itself. Further, the benefit of the restriction will pass on the sale of the dominant tenement as an easement, appurtenance, or incident of ownership, unless it appears to be of a purely personal character. And, in like manner, a purchaser of the servient tenement, with notice of the restriction, will be held bound by the same duties and obligations as those under whom he claims; it being a familiar rule in equity that the engagements binding on the conscience of the owner of property, are equally so on those who succeed him in title with a knowledge of their existence. To the extent of those engagements, he and they are considered in the light of trustees for those who are entitled to their benefit: *Rankin v. Huskisson*, 4 Sim. 13; *Whatman v.*

Gibson, 9 Id. 196; *Schreebner v. Rees*, 10 Id. 9; *Mann v. Stephens*, 15 Id. 397; *Tulk v. Moxhay*, 11 Beav. 571; 2 Phill 774; *Patching v. Dobbins*, Kay 1; *Cole v. Sims*, Id. 56; 5 De Gex, M. & G. 1; *Hudson v. Coppard*, 29 Beav. 4; *Piggott v. Stratton*, 1 De Gex, Fish & Jones 33.

That these conclusions are the natural consequence of established doctrines cannot be denied; yet it must be conceded, on the other hand, that it is only recently that they have acquired this definite shape. The earlier equity decisions will be found generally to discuss questions of this kind on the basis of *Spencer's Case*, and the other authorities at law. In *Holmes v. Buckley*, 1 Eq. Cas., Abr. 27 (A. D. 1691), there had been a grant in fee of a watercourse over certain land, with a covenant on the part of the grantor, for his heirs and assigns to cleanse the watercourse from time to time. This covenant was enforced in equity by an assignee of the watercourse against an assignee of the land, on the ground that it was one *running with the land*, which, however, would seem to be an error. The case of the *City of London vs. Richmond*, 2 Vern. 421 (A. D. 1701), was one where a bill to compel the payment of rent reserved on a lease of waterpower, was sustained against an assignee, on the ground, it would seem, that the subject of the lease being an incorporeal hereditament, there was no privity of estate, and, therefore, no remedy at law, but the inevitable *Spencer's Case* was cited. On the other hand, in *Chandos vs. Brownlow*, 2 Ridw. P. C. 416 (A. D. 1791), the question arose on a covenant for renewal of a lease, and the Lord Chancellor of Ireland laid it down positively that no relief could be given in equity on a covenant which did not bind the land at law. The decision of the House of Lords, however,

was against his opinion on the whole case, whether on this, or on other grounds which were involved, does not appear. In *Barret vs. Blgrave*, 5 Ves. Jr. 555 (A. D. 1800), an injunction was granted against an *under tenant* for a violation of a covenant in the original lease, against carrying on a particular business on the demised premises, though no action at law would lie in such case. The matter, however, was not argued for the defendant. Then in *Bedford vs. Trustees of the British Museum*, 2 M. & K. 552 (A. D. 1822), Lord Eldon, putting aside any question as to the validity of the particular covenant at law, based his decision, which was the refusal of an injunction, on general grounds of equity; and he adopts the same mode of dealing with the subject in *Roper vs. Williams*, 1 T. & R. 18 (A. D. 1822), a very similar case. It cannot be said that these two decisions are direct authorities in favor of the doctrines which we have above stated to be now established; but, by changing the plane of discussion from law to equity, they undoubtedly prepared the way for it. Next followed the well known case of *Keppel vs. Bailey*, 2 M. & K. 517 (A. D. 1834), in which Lord Brougham went over the whole topic of covenants running with the land, in a manner to exhibit very strongly his learning, industry, and ability, and, at the same time (with due respect be it said), his entire misconception of the elemental principles of equity. After a review of the authorities, he held, perhaps correctly, that the covenant in question there did not bind the assignee at law, and, therefore, he shortly decided, did not bind him in equity. Notice to a purchaser of such a covenant, amounted to nothing, he said, for it was only notice of what could not affect him! Even if his conclusion

were right, his reasoning would have destroyed half the jurisdiction of Chancery. To enforce against purchasers with notice, trusts and contracts which could not possibly affect them at law, is its especial province. The assignee of a simple contract even, could not sue the debtor in *assumpsit*; but, if the latter paid the assignor, after notice, his chance in a Court of Equity would be a poor one. The truth is, that Lord Brougham confounded the case of a covenant void *ab initio*, with one which, valid in itself, was simply incapable at law of assignment, as respects its benefit or its burthen. This is plain, because the drift of his main argument is that, to encourage the assignability of covenants of this nature, would lead to "bold attempts to create new kinds of liability and new species of estate." To which the answer is, that, of course, there must be some limit put to the validity of agreements affecting land; but that is no reason why a covenant which is perfectly good between A. and B., shall not be enforced as between C. and D., their respective assignees. To say that X., who has taken a conveyance of a lot of ground under a restriction against dangerous or offensive trades, can be held to the letter of his bargain, however long he may live; yet, that if he sell it at once to Y., he may use it for a powder-mill, or knacker's yard, if he likes, is simply absurd.

This decision in *Keppel vs. Bailey*, seems to have been considered as a harmless eccentricity, for the Vice-Chancellor of England, and the Master of the Rolls, were quite disregarding of it in the subsequent cases of *Whatman vs. Gibson*, *Schreebner vs. Read*, *Mann vs. Stephens*, and *Tulk vs. Moxhay*, before cited; and in this last case, on appeal, it was summarily disposed of by Lord Cottenham, who observed, in effect, that

Lord Brougham could not have meant what he said there, but that if he did he could not coincide with him. *Tulk vs. Moxhay* was the case of a conveyance in fee of a lot of ground, with a covenant by the grantee only to use as a private square, which was enforced against a purchaser with notice. The Lord Chancellor said the question was not "whether the covenant ran with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased;" which he answers at once in the negative, saying: "If an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased." This was followed by Vice-Chancellor Wood in *Patching vs. Dobbins and Cole vs. Sims*, *ut supra*, and by the Equity Court of Appeal, on an appeal in this last case. This may be considered to set this branch of the subject at rest.

Another objection to covenants and restrictions of this character, independent of that of their assignability, which has been unsuccessfully urged in most of the cases cited, is, that, they lead to a perpetuity, and are in restraint of trade. But this was admitted even in *Keppel vs. Barley* not to be tenable, was expressly overruled in *Tulk vs. Moxhay*, *Cole vs. Sims*, and *Hodson vs. Coppard*, *ut supra*, which last was the case of a conveyance in fee, with a covenant that certain trades should not be carried on on the premises.

So far, then, the principal English authorities. In this country, the decisions in New York arrive at the same result, though not, perhaps, with the same clearness and precision. In *Hill vs. Miller*, 8 Paige, 254, and *Trustees of Watertown vs. Cowen*, 4 Id. 510, it

was held by the Chancellor that a covenant, or even a collateral agreement on the sale of land in fee, not to build on a particular part of the lot conveyed, would be enforced in equity in favor of a sub-assignee against a purchaser with notice, on the ground that an easement or privilege was thereby created which ran with the land, and was capable of division. So in *Barrow vs. Richards*, 8 Paige, 351, a similar covenant against the carrying on offensive trades was decided to be binding even as against a previous purchaser from the same vendor. And in *Tallmadge vs. East River Bank*, 2 Duer, 614, specific performance of a parol agreement between purchasers of adjoining lots, not to build beyond a certain line, having been acted on, was decreed against one who had violated it. That the agreement is expressed in the deed in the strict form of a condition at law, is no reason why specific performance should not be compelled: *Aiken vs. Albany, Vermont & Canada Railroad*, 26 Barb. 289. In Pennsylvania, also, it has been held that an independent parol engagement between a vendor and vendee, that the buildings on a particular lot, of which part was sold, should be restricted to a certain frontage line, would bind the land: *Scott vs. Burton*, 2 Ashm. 812; but in this case relief was refused against a purchaser without notice. Some of these cases, unfortunately, do not sufficiently discriminate between the grounds of decision at law and in equity on this subject, and use expressions borrowed from the rules laid down in *Spencer's Case*, which are not very accurately applied. See the observations in the American note to *Spencer's Case*, *ut supra*. An expansion of remedy which may be very wise in the one tribunal is not always so in the other; for it must be remembered, for the protection of assignees of

the land, that the defence of "purchaser without notice" is not available at law.

In a recent case in Massachusetts, which arose on a restriction contained in a conveyance of a building lot, against the use of the premises for any nauseous or offensive trade, the later English doctrine was expressly followed and applied: *Whitney vs. Union Railway Co.*, 23 Bost. L. R. 401. The language of the learned judge who delivered the opinion of the court, places the matter in its true light, and sustains such restrictions in equity against purchasers with notice. But a later case of *Badger vs. Boardman*, 24 Bost. L. R. 303, which was also in equity, is not so satisfactory, and shows a tendency to return to the old common law doctrines. There a grantor conveyed part of a larger lot of ground, with a restriction against erecting any building thereon above a certain height. This was held to be a purely personal covenant, and not to pass to an assignee of the remaining land, there being, in the opinion of the court, no language in the deeds under which the parties claimed from which it could be fairly inferred that this restriction was *intended* to enure to the benefit of the estate owned by the plaintiffs, who as assignees were seeking to enforce the covenant.

This last decision, as it is in conflict with that which is the occasion of this note, and at variance with the views therein expressed, perhaps requires a few words of respectful comment. There may have been something in the facts of the case, which would justify the conclusion arrived at; but it would seem to us, with great deference, that the argument, from the silence of the deeds on the subject, ought to have been reversed. It is not reasonable to suppose that a grantor, unless he says so in express terms, means a restriction

of this character to operate only for his own personal benefit, and not for that of the land retained by him. Why should he? As it to that extent depreciates in value what he is selling, it is equivalent to so much purchase-money retained; and it would be a foolish bargain, indeed, to sacrifice a distinct, present advantage, for the chance of being bought off for a small sum at a future day, when he has parted with his interest. Nor is it more reasonable to suppose that such a remote contingency enters into the calculation of the vendee, particularly as it is quite probable that, if it should ever happen, it would enure to the benefit of some grantee of his own, not to himself. And it would be equally foolish for him to add to his purchase-money upon so fragile a hope. To import such a meaning into a contract of this nature, would turn it so far into a mere aleatory one, the more to be discouraged, because it would tend to mislead and injure sub-purchasers of the grantor. A Court of Equity, therefore, applying the covenant or condition to the facts of the case, and not merely parsing the words in which it is expressed, as the old common law judges did, must presume that it was stipulated by the grantor, for the benefit of his adjoining property. This being so, it would pass, on a sale of the latter, to the purchaser, without any express words in the conveyance, as a mere equitable incident or appurtenance, as, indeed, all subsidiary rights, easements, or privileges connected with property necessarily do, if nothing is said to the contrary.

Having now sketched the history and development of the doctrine of courts of equity on the general subject of the principal case, there are some observations on its practical operation, and the limits within which it ought to be confined, which it would be desirable to

make, as it is obvious, if not carefully guarded, it might hereafter lead to some inconvenient consequences; but we have not sufficient space for the purpose. There is one suggestion, however, which we may throw out in conclusion, for what it may be worth. The common law rule, as corrected by the statute of 32 Henry VIII., confined the assignability of covenants with a grantor of land, to cases where he had some reversionary title left in himself. There is no doubt that there was much practical wisdom in this, for if burthens on real estate, perhaps capriciously or foolishly created, could be enforced in *perpetuum*, in favor of persons who had no interest to be protected or advantaged thereby, the inconvenience and detriment to the community at large would be very great. But the older lawyers looked on a piece of land only as an isolated fact, subdivisible, in point of ownership, into particular estates, with a reversion or remainder, but having no definite juridical relation with any other piece of land. At the present day, in a more complicated organization of society, it often happens that a man who sells a small lot of land out of a larger one, has as great an interest to protect in that which remains in him, as he could have upon any technical reversion; much greater, indeed, than in that dependant on a lease for a thousand years, to which covenants may unquestionably be attached. He has, in fact, a sort of material reversion. Is it not possible, then, from this point of view, to adapt

the old rules of law to their changed circumstances, so as to reconcile, in some degree, the conflicting decisions at law and in equity? Now a man may obtain an injunction, where he could not bring an action, or could at any rate recover only nominal damages. Indeed, for most practical purposes, the ingenious logic and abstruse learning of *Spencer's Case*, must hereafter be of small importance. Yet it would be a pity to lose sight of the principles which lie behind them, and to swing so far in the opposite direction as to obliterate all distinction between real and personal covenants. Would it not be well to preserve the essence and reason of that distinction, by enlarging, if it could be done, the doctrines of the earlier cases, so as to comprehend, not merely reversions proper, but that very real, though still unrecognised interest, which, as we have said, a grantor retains in the material subdivisions of his land? This, perhaps, could not be done at law, without the aid of a statute, but it might prove to a Chancellor a safer and readier clue to determine the character of a covenant or condition, than any general notions of equity, which must vary much with individual judges. It is always better, where it is possible, to follow the analogy of established principles, where they have ceased to be directly applicable, than to elaborate a new theory, which must require a long time, and involve much conflict of decision, before it can be condensed into a practical system of rules. M. W.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF PENNSYLVANIA.¹

Tenancy by the Courtesy, Seisin necessary to create—Construction of Will—Life Estate in Land not created by Bequest of Rights and Privileges in it.—In Pennsylvania a surviving husband is entitled to courtesy of land of his deceased wife, though she had no actual possession, but only potential seisin during her life. If she had possession by a tenant for years, or only the right to present possession, it is sufficient: *Buchanan vs Duncan*.

A testator, by will, provided that his widow, during her life, should live upon the homestead farm, upon which she was to have certain rights and privileges; as, a portion of the dwelling-house, one-half of the garden, one-half of the share of the grain coming from the tenant, pasture in summer and hay in winter, for her cow and horses, firewood, &c. He then made a distribution of his whole estate, and after making a few legacies and bequests, gave to each of his two daughters, who were both married, the "one-half part of his real and personal estate for the use and benefit of her legal heirs;" afterwards, and before the death of the widow, one of the daughters, the wife of B., died, and her husband claimed his courtesy as one-half of the farm. In an action of ejectment, brought by him, it was *held*, that the widow had not an estate or life in the homestead farm, but only certain rights and privileges in it: *Ib.*

That, subject to the provisions in favor of the widow, it descended to the two daughters at the death of the testator, the wife of B. taking an estate in fee simple in one undivided moiety of the farm, in which her husband was entitled to an estate by courtesy at her death: *Ib.*

Remedy of Wife when Husband is one of two or more Debtors—Statute of Limitations as to such contract—Rule as to Hearing of Exceptions not made before Appeal to Supreme Court.—A married woman in 1845, went to her husband and another trading in partnership, a sum of money on interest, out of her own separate estate. In 1857 the firm made an assignment for the benefit of creditors. Upon distribution of the firm

¹ From Robert E. Wright, Esq., State Reporter, to be reported in the 4th volume of his Reports.

assets, under the assignment, it was *held*, that she was entitled to a distribution upon the amount of her note, with interest, and that her claim was not barred by the Statute of Limitations: *Kutz's Appeal*.

The wife could not maintain an action at law against the promisors, for one of them was her husband; and if the money was held in trust, and was not recoverable at law, the Statute of Limitations would not run against her. The disability of coverture, in equity as well as in law, under which she was, from the date of the note to the assignment, would prevent the running of the statute; so that she was not barred of her claim in equity: *Ib.*

Where the wife's claim was resisted before the Auditor and in the Court below, on the sole ground that it was barred by the statute, it is too late afterwards to object, that there was no proof that the sum loaned was not her separate estate. She was permitted to receive and loan out the money, and neither her husband nor the creditors claiming through him, can object that the money loaned was not hers: *Ib.*

Advancement, Evidence of—Expense of Educating Child not presumed to be an Advancement—Effect of Parent's Declarations.—Questions of advancement depend upon the intention of the parent, at the time when the property is received by the child: *Miller's Appeal*.

Money furnished by a parent for the education of a child will not be presumed to be an advancement, without proof that such was the intention of the parent; for the education of a child is a parental duty; nor is there such a presumption where security is taken from the child for the amount received, or where the parent attempts to preserve evidence of it as a debt, by note, bond, book account, or otherwise: *Ib.*

Therefore, where a parent expended money for the education of his son, which he charged against the son, in his "day book," (wherein he kept his accounts, and in which the son was credited for partial repayments,) and not in a "family book," where advanced portions are usually entered, it was *held*, that the money furnished by the parent was not an advancement, but a debt due by the son, intended to be such by the father, when it was expended for the use of the son: *Ib.*

Declarations by the father, made in the absence of the son, not communicated to him, and after most of the money had been furnished and charged against him in a book account, that "it" was to come off from his

"*erbschaft* or inheritance," are not sufficient to convert the existing debt into an advancement: *Ib.*

Advancement, charged by Testator against his Daughter—Effect of on Claim remitted to her Husband.—One purchased a farm from his wife's father, during her lifetime, and having paid most of the purchase-money, a portion of the balance due was remitted by the father, who took a bond for the remainder; the amount thus remitted was charged to the daughter in the "family book," as cash paid for her. After her death her husband administered upon her estate, and upon account filed, he was sought to be charged with the sum remitted: *Held*, that the transaction did not make the husband the debtor of the wife, and that he was not chargeable with it in administering upon her estate: *Mast's Appeal*.

The amount remitted by the father was an advancement to the daughter, though made to the husband; it was not a debt due to the wife from the husband, for when remitted, he ceased to owe it, and the direction in the father's will, that it should be deducted from the daughter's share, could not operate as an assignment of it as a debt against her husband: *Ib.*

The husband is not chargeable for receiving the amount remitted as his wife's money, for it was remitted directly from the father to the son-in-law, and was not her property under the Act 11th April, 1848, so that her husband could be responsible to her for receiving it: *Ib.*

Action by Widow against Innkeeper for Death of Husband caused by Intoxication.—*Acts of April 15th, 1851, May 8th, 1854, and April 26th, 1855, construed.*—Under the Act of April 15th, 1851, a widow may maintain an action for damages against an innkeeper, for furnishing her husband liquor when intoxicated, in consequence of which he fell under the wheel of his wagon and was killed: *Fink vs. Garman*.

That act not only regulated a common law right of action, by securing to it survivorship, but created a new and original cause of action, unknown to the common law, in favor of a surviving widow or personal representative, who had no right of action before: *Ib.*

The right of action under the Act of 1851, was for the "unlawful violence or negligence" of the defendant; and by the Acts of May 8th, 1854, and April 26th, 1855, the giving or selling liquor to a man of

known intemperate habits who was already intoxicated, was such "unlawful violence or negligence" as would render the innkeeper so doing, liable to respond in damages for any injury causing death, at the suit either of the widow, children, or parents of the decedent : *Ib.*

After the Act of 1854, the furnishing of liquor to an intemperate man, which was before that time unlawful under the laws of Pennsylvania, would clearly be an act of "unlawful negligence," within the meaning of the Act of 1851 : *Ib.*

The act of the decedent in taking the liquor offered to him while intoxicated, is not such concurring negligence in him as would relieve the defendant from liability in damages ; for it was not a responsible concurrence, and the Act of 1854, which makes it a misdemeanor to furnish an inebriate liquor, does not make the drunkard responsible for accepting the furnished liquor, nor take any notice of his act whatever : *Ib.*

It is not the party whom the inebriate injures, only, who can sustain an action for damages under the statutes ; by the Act of 1854, "any person aggrieved" may sue, and the widow is a person "aggrieved" by the death of her husband, by the Act of 1855, under which she has her action : *Ib.*

Public policy and the statute law of Pennsylvania alike forbid that liquor should be furnished to one who is either at the time intoxicated, or who is habitually intemperate, though not presently intoxicated : *Ib.*

SUPREME COURT OF MASSACHUSETTS.¹

Specific Performance not decreed upon Defective Title.—A court of equity will not compel one who has agreed to purchase land to accept a title so doubtful that it may be exposed to litigation : *Richmond vs. Gray.*

A decree for specific performance of an agreement to purchase land will not be ordered, if the vendor could not make a good title thereto at the time when, by the terms of the agreement, he was to deliver a deed thereof, or for more than six months after the vendee declined to accept a deed on account of a defect in the title ; although he may be able to do so at the time when the decree is sought for, or the bill filed : *Id.*

If one who has agreed to purchase land enters into possession thereof

¹ From Charles Allen, Esq., State Reporter ; to be published in the forthcoming volume of his Reports.

by consent of the vendor, and makes changes therein, by removing a cellar wall, cutting trees and exercising other acts of ownership, before the delivery of a deed, he will not for these reasons be compelled by a court of equity to accept a defective title, if he abandons the possession as soon as he learns of the defect: *Id.*

Bill of Lading not conclusive as to Property not Shipped.—A bill of lading is conclusive evidence against the master of a vessel in favor of a consignee, not a party to the contract, who has advanced money upon the faith of its statements, as to the amount and condition of the property of which it acknowledges the receipt, so far as from the whole instrument and usage of trade the facts may be regarded as absolute statements from the master's own knowledge; but it is not conclusive against the owners, as to property not actually shipped, because it is not within the scope of the master's authority from the owners to sign bills of lading for any property but such as is put on board: *Sears vs. Wingate.*

In an action by the owners of a vessel, of whom the master is one, to recover freight for goods actually carried, delivered and accepted, the consignee cannot recoup in damages a loss sustained by him by reason of a failure to deliver cargo never actually put on board, but which the master, without other authority than belonged to him in that capacity, improperly receipted for in the bill of lading. The proper remedy is by an action against the master, or the consignor: *Id.*

Administration granted before Death void—Savings Bank.—A depositor in a savings bank may maintain an action to recover the amount of his deposit, although, upon production of the deposit book, the bank has paid the amount due to one who has been appointed as his administrator under the erroneous belief that he was dead, after he had been absent for more than seven years without being heard from: *Jochumsen vs. Suffolk Savings Bank.*

By-laws of a savings bank which provide that "upon the death of any depositor, the money standing to his credit shall be paid to his legatee, or next-of-kin, or legal representative," and that "it is agreed that such payee shall discharge the corporation," and that, "as the officers of this institution may be unable to identify every depositor transacting business at the office, the institution will not be responsible for loss sustained where the depositor has not given notice of his book being stolen or lost, if such money is paid in whole or in part on presentment," and that "no person

shall receive any part of his principal or interest without producing the original book," will not prevent a depositor from maintaining an action against the savings bank to recover the amount of his deposit, which, upon production and delivery to it of the deposit book, it has paid to one who has been appointed administrator of the depositor, under the erroneous belief that he was dead, after he had been absent for more than seven years without being heard from: *Id.*

COURT OF APPEALS OF NEW YORK.¹

Town, Erection or Division of—Form of Proceedings—Regularity to be presumed.—The question whether a town has been legally erected may be tested in an action in the nature of a quo warranto against one claiming to exercise the office of supervisor of such town: *The People vs. Carpenter.*

The act of a board of supervisors dividing a town and forming a new one from a portion thereof, only described the dividing line: *held*, that the uncertainty was cured by the reference in such act to the petition, &c., upon which it was founded, and from which it appeared that the new town was to lie south of the line of division, and by proof *aliunde* that the place named in the act for holding the first town meeting was south of such line: *Id.*

The statute (ch. 194 of 1849) does not, *it seems*, require that the published copy of notice of the application of twelve freeholders for the erection of a new town shall contain the names of such applicants. It is sufficient that the notice posted should be thus subscribed: *Id.*

An affidavit stating that a notice was left with another person to be posted up, "which was done," construed as a positive averment of the posting: *Id.*

The act of the supervisors is, it seems, one of a legislative character in favor of the regularity of which all presumptions are to be indulged. Those who would impeach it, have the burden of disproving a compliance with the conditions imposed by law as a requisite to the exercise of the power: *Id.*

Surrogate, Jurisdiction of—When Decree may be opened.—The effect of the repeal in 1837 (ch. 460, § 71), of the restrictive clause in respect

¹ From E. P. Smith, Esq., State Reporter.

to the jurisdiction of surrogates' courts (2 R. S., p. 221, § 1), is to restore to such courts the incidental powers possessed by them previous to the Revised Statutes: *Sipperly vs. Baucus*.

A surrogate has the power to open a decree made by him on the final accounting of an administrator, and to require a further account in respect to a sum received by him with which he had charged himself, as \$14.80 instead of \$1480: *Id.*

There is no positive limitation of the period in which such application may be made, and the lapse of four years does not of itself import laches: *Id.*

Corporations—Power to Commute for Taxes, where Profits below 5 per cent.—The act (ch. 654 of 1853), allowing corporations which have not received net annual profits equal to five per cent. upon their capital, to commute for taxes is applicable only to corporations which have been in existence for a full year before the assessment is made: *The Park Bank vs. Wood*.

Held, accordingly, that a bank which had been organized only three months was liable to be taxed for the full amount of its capital, though its income and profits were less than five per cent.: *Id.*

Will.—A will, after bequests of two small legacies, contained the following clauses: *Third.* I give and devise to my beloved wife, A. B., all my real and personal estate, together with any and all estate, right or interest which I may acquire after the date of this will, as long as she shall remain unmarried and my widow. *Fourth.* I give and bequeath to my beloved wife, A. B., all my household furniture, wearing apparel and all the rest and residue of my personal property." The testator died childless. *Held*, that she is entitled to take absolutely the furniture, wearing apparel and other personal property of the same kind, and the income, but not the principal, of the productive personal estate during her widowhood: *Dole vs. Johnson*.

Evidence—Attesting Witness—Agency—Ratification.—The execution of a witnessed instrument which is offered in evidence by one who is a party to it cannot be proved without calling the attesting witness, if he is living, competent and within reach of the process of the court; and this rule is not altered by the passage of a statute authorizing parties to testify: *Brigham vs. Palmer*.

If one assumes to sell the property of another and takes in payment a note running to himself, the owner of the property cannot sustain an action for goods sold and delivered against the purchaser: *Id.*

Promissory Note—Notice to Indorser.—It is sufficient to fix the liability of the first indorser of a promissory note, if on the day of its dishonor a duplicate notice for him was inclosed by a notary to the second indorser, who, immediately after receiving it, deposited it in the post office, properly addressed to him; although he lives in the same town where the note was payable and protested, and the second indorser lives in another town: *True vs. Collins*.

A notice addressed to "Mrs. Susan Collins, Boston," is *prima facie* sufficient to charge her as an indorser, if she lived in Boston: *Id.*

Action—False Representations.—The owner of land who has directed an agent to erect a house at a particular place thereon cannot maintain an action against a third person who, by false representations as to the true boundary line of the land, has induced such agent in the owner's absence, to erect the house at a different place: *Silver vs. Frazier*.

Accord and Satisfaction—Promissory Note.—Payment of less than the face of several promissory notes, a portion of which are not due, is a good satisfaction of all of them, if upon the receipt and acceptance of the same by the holder the notes are given up to the maker: *Bowker vs. Childs*.

Equity—Reformation of Written Instruments.—In order to sustain a bill in equity to reform a deed on the ground of mistake, there must be full and satisfactory proof that it does not conform to the oral contract as understood by either party: *Sawyer vs. Hovey*.

Promissory Note—Composition.—A promissory note for the balance due to a creditor of the maker, over and above the amount paid to him under an agreement for composition, given after the maker has been discharged thereby, but in fulfilment of an oral promise by which the creditor was induced to sign the same, is invalid in the hands of the payee: *Howe vs. Litchfield*.

Bill of Exchange—Discharge of Indorser.—If the holder of a bill of exchange makes a valid compromise with the assignees of the acceptor, who is insolvent, by which the proof of the claim is withdrawn and the insolvent estate released, he thereby discharges from liability a stranger to the bill who wrote his name upon the back of it before its delivery: *Phoenix Cotton Manufacturing Company vs. Fuller*.

Way.—A town is not liable in damages to one who, while stopping in the highway for the purpose of conversation, leans against a defective

ailing and is injured by reason of its insufficiency: *Stickney vs. City of Salem*.

Way—Dedication.—A way constructed and kept in repair by a private corporation upon its own land for its own use and convenience and the use and convenience of tenants occupying its houses upon both sides thereof, opening into a public street, having a sign "Private way" upon the corner, but left open to public travel for more than twenty years without interruption, is not thereby dedicated to the public; nor does it become a public way by prescription: *Durgin & wife vs. City of Lowell*.

Corporation—Principal and Agent—Joint action of Tort against Corporation and its Agents.—A joint action of tort, in the nature of trespass, may be maintained against a corporation and its servant, for a personal injury inflicted by the latter in discharging the duties imposed on him by the corporation, although they might have been equally well discharged without the use of undue or illegal force: *Hewett vs. Swift*.

The president of a corporation is not made liable to an action for a personal injury, merely by transmitting an order of the corporation to a servant who in executing it uses illegal force; but if the order is issued by him on his own responsibility, he is liable: *Id.*

Married Woman.—A married woman cannot form a partnership with her husband, and is not liable upon a promissory note given by a firm of which, by partnership articles, she and her husband have agreed to be members: *Lord vs. Parker*.

Married Woman—Promissory Notes—Consideration.—If a married woman has for her own benefit invested her sole and separate money in a firm of which her husband is a member, an assignment by her to a third person of her share, interest, contribution and investment in the firm is a sufficient consideration to support an express promise to pay an agreed price therefor; and such promise, though not in writing, may be enforced, if she, in consideration thereof, relinquished all claim against the firm: *Lord vs. Davison*.

Partnership—Dissolution by Death.—A surviving partner cannot be held responsible on a contract made without his assent or knowledge by another partner, after the firm has been dissolved by the death of one of its members, although no notice of its dissolution has been given to the person with whom the contract was made: *Marlett vs. Jackman*.

Promissory Note—Consideration—Stock Jobbing.—A promissory note given in consideration of money paid by request of the maker to a broker, for losses sustained in stock jobbing transactions negotiated by the latter for the former, in violation of the statute, is valid; and money paid for losses in stock jobbing transactions cannot be recovered back: *Wyman vs Fiske*.

Trust—Discharge of Voluntary Trustee.—One who undertakes to act as trustee of a particular fund for another, from whom he received it, without compensation, with no beneficial interest in the fund, and with no agreement to act for any specified length of time, is entitled to be discharged whenever the further execution of the trust becomes inconvenient to him: *Bogle vs. Bogle & others; Bogle vs. Bogle*.

A trustee who has mingled the trust fund with his own property, and in rendering his account has failed to charge himself with the full sum due from him, is not entitled to have the costs of a bill in equity instituted by him to obtain a discharge from the further execution of the trust allowed out of the fund; but will be charged with the payment of the expenses of taking the account: *Id.*

Seaman's wages—Unlawful Discharge of Seaman—Damages.—In an action of contract by the mate against the owners of a vessel to recover the damages sustained from the unlawful act of the master in wounding and discharging him in a foreign port while in the prosecution of a voyage, upon shipping articles signed by him, the plaintiff may recover such damages as will compensate him for the injury sustained by him in consequence of the breach of the contract; and no exception lies to an instruction by the presiding judge, authorizing the jury to allow to him wages up to the time when he was sufficiently recovered to sail for home, and for such further time as was reasonable for obtaining a passage, and making a voyage to the United States, and the expenses of his board, nursing, medicines and medical attendance until he had so recovered, and of his passage home, although the time so embraced was longer than that occupied by the voyage mentioned in his shipping articles: *Croucher vs Oakman*.

Fraud—Sale.—Purchasing goods with an intention not to pay for them is a fraud which will render the sale void and entitle the vendor to reclaim the goods from the vendee or any subsequent purchaser with notice or without consideration, although there were no fraudulent misrepresentations or false pretences: *Dow vs. Sanborn*.

Legitimacy—Evidence.—Declarations of a deceased mother that her child was born before her marriage, and corroborating statements by her of the circumstances and history of her life, are competent evidence to prove that the child was illegitimate; but evidence of a general reputation that the child was illegitimate is not competent: *Haddock vs. Boston and Maine Railroad*.

Habeas Corpus—Husband and Wife—Insanity.—A married woman committed to an insane asylum by her husband is not entitled to be discharged, on *habeas corpus*, if it appears that the asylum is well managed, and she is subjected to no unnecessary or unusual restraint or improper treatment, and her remaining there will tend to promote her recovery. And it is immaterial that, previously to her commitment, she had consulted counsel in reference to a divorce, and has since filed a libel for divorce: *Denny vs. Tyler*.

Nuisance—Liability of Tenant for Years—Notice to abate.—Restoring a structure which was a nuisance to a right of way, and which has been abated, will render a tenant for years liable, although the structure existed before the commencement of his tenancy; but merely refitting it after it has been injured but not abated will not render him liable: *McDonough vs. Gilman*.

A tenant for years is not liable for keeping a nuisance as it used to be before the commencement of his tenancy, if he has not been notified to remove it, or done any new act which of itself was a nuisance: *Id.*

A notice to a tenant for years to remove a nuisance which is only kept by him as it used to be before the commencement of his tenancy must be distinct and unequivocal, in order to lay the foundation of an action against him for its continuance: *Id.*

SUPREME COURT OF NEW YORK.¹

Receiver in Supplementary Proceedings—Priority of Liens between Creditors—Lis pendens.—In proceedings supplementary to execution the court does not appoint more than one receiver of the property of the judgment debtor, however numerous may be the creditors' bills or supplementary proceedings against him: *Myrick vs. Selden*.

An action will not lie by one judgment creditor against another, to de

¹ From the Hon. O. L. Barbour, reporter of the Court.

termine the question as to the priority of their respective liens upon the equitable property of the judgment debtor in the hands of the receiver: *Id.*

The commencement of a suit in equity by the service of a summons and injunction, creates a *lis pendens* and a lien in the nature of an attachment or a statute execution, upon the equitable property of the defendant. But the plaintiff must prosecute his action diligently, or the lien will be lost: *Id.*

Account payable in Specific Articles; Demand or Election.—If an account is payable in specific articles, upon demand, no action will lie for the recovery of money; nor can such account be used as a set-off, until after a demand and refusal to pay in the specified articles, and in the mode stipulated in the contract: *Smith vs. Tiffany.*

Where a creditor agrees to receive payment of his debt in lumber at the saw-mill, or in flour, meal, &c., at the grist-mill, of the debtor, there is no duty to pay in money, until the creditor has made his election to receive his pay in some of those articles, and has demanded payment accordingly: *Id.*

Slander; Pleadings and Proof; Variance.—An action for slander, in charging the plaintiff with having “*stolen*” property, “and carried it away,” will not be sustained by proof of a charge that the plaintiff “*took*” things from the defendant, which were found in the plaintiff’s possession: *Coleman et ux. vs. Playsted et ux.*

Where the question submitted to the jury is, what was the meaning and sense of the words proved, as understood at the time, all that was said by the defendant during the same conversation, and in the same connection, is admissible, for the purpose of giving character to the words spoken, and showing malice: *Id.*

Cloud upon the Title.—Where an instrument purporting to create a trust in respect to real estate is void upon its face, it will carry its own condemnation with it, and will not be, in a proper and legal sense, a cloud upon the title, which will authorize a court of equity to interfere, to set the instrument aside: *Hotchkiss vs. Etting.*

The existence of a power in trust, valid in itself, and once capable of execution, but now incapable of execution by reason of the death of the person having the power of appointment, without an exercise of the power, does not present a case for the exercise of the equitable power

of the court to remove a cloud upon the title, by reason of the necessity of resorting to extrinsic evidence to establish the extinguishment of the power: *Id.*

Judgment, against whom Evidence—Stockholders in Corporations; how proved to be such.—A judgment against a corporation as acceptor of a draft, is *prima facie* evidence, in an action against a stockholder, to enforce his individual liability, that the draft was properly drawn and accepted by a duly authorized officer of the company: *Hoagland vs. Bell.*

Where the name of an individual appears on the stock-book of a corporation as a stockholder, this is presumptive evidence that he is so. And, in an action against him as a stockholder, the burthen of proving that he is not such is thrown upon him: *Id.*

Action for Divorce; Right of Defendant to have Marriage annulled.—In an action by a wife against a husband for a divorce, on the ground of cruelty, the defendant cannot have a judgment annulling the marriage, on the ground that the wife had a former husband living at the time it took place, even upon the default of the plaintiff at the hearing: *Linden vs. Linden.*

Partnership; Persons holding themselves out as Partners.—To enable creditors of a partnership to recover a debt against a person as a partner, on the ground that he held himself out as such, they must prove affirmatively that he did so represent and hold himself out to them; or, at least, that they were informed of such representations before the credit was given to the firm: *Irwin et al. vs. Conklin et al.*

A person not a partner in fact, will not make himself liable to creditors for the debts of the firm, by holding himself out as a partner, unless it appears that the creditors gave credit to the firm *after* such representations came to their knowledge: *Id.*

If there is no evidence that the creditors knew, at the time the goods were sold to the firm, that an individual had held himself out, or suffered himself to be held out as a partner, the latter will not be estopped from denying his liability as such: *Id.*

Innkeepers; Liability for Property Stolen.—Innkeepers are answerable for the honesty not only of their servants, but of their guests: *Gile vs. Libby.*

In an action against innkeepers by a guest, to recover the value of pro-

perty lost by the latter, proof of the loss or larceny of the goods from the room occupied by the guest, is alone sufficient proof of carelessness on the part of the defendants: *Id.*

What will amount to carelessness on the part of a guest, which will excuse the innkeeper: *Id.*

Statute of Limitations—Foreign Corporations—Liability of Corporations, on Drafts.—The statute of limitations does not operate as a bar to an action in the courts of New York, against a foreign corporation: *Thompson vs. Tioga Railroad Company.*

Such a corporation is within the exception to the operation of the statute, by which the time of absence from the state is not to be taken as any part of the time limited for the commencement of an action: *Id.*

Where drafts were drawn by W., the president of a corporation, and signed with his own name, with the addition "Prest. T. N. Co.," and it was proved that he drew the drafts in his capacity of president, for the benefit of the company; that the company received the proceeds; and that it subsequently recognised its liability, by giving its bond as collateral: *Held*, that the evidence showed that the signature of W. was official, and rendered the drafts the drafts of the company: *Id.*

Debtor and Creditor.—Where creditors receive from their debtor the note of a third person for collection, the proceeds to be applied upon the debt of such debtor, they will be deemed to have assumed the obligation of an attorney, or agent for the collection of the demand: *Buckingham vs. Payne.*

They are bound to use ordinary diligence in the collection of the note, and are responsible for ordinary neglect. Negligence, in such a case, is a question of fact: *Id.*

ABSTRACTS OF RECENT ENGLISH DECISIONS.

COURT OF CHANCERY.

Marine Insurance—Assignment of Policy.—R., the owner of a cargo of wheat shipped at Odessa for England, valued at 7000*l.*, effected two policies, one for 4000*l.* and the other for 3000*l.* The cargo fell in value, and was agreed, on the 8th of March, to be sold to an agent of B. for 5358*l.* by a contract for sale of cargo, including all shipping documents,

freight and insurance, and the documents were accordingly delivered; and B., on the 13th, gave an order for the amount, which was paid on the following day. R. indorsed on the policy for 3000*l.*, "We transfer this policy to Messrs. — to the extent of 1700*l.*," and the same was delivered to the agent of B. The ship and cargo were totally lost on the 16th of the same month. The insurance company paid 1300*l.*, the remainder of the 3000*l.*, into court; and Vice-Chancellor Wood decided that the same belonged to R., for that B., under his contract, was not entitled to an assignment of all existing policies effected on the cargo, but merely to have the cargo sufficiently insured; and that a provision in his contract, that the price was to be paid in exchange for bills of lading and policies of insurance, did not alter the case. From this decision B. appealed; and it was held, reversing that decision, that R. was not so entitled, but that the whole 3000*l.* secured by the policy, belonged to B., the wheat having been sold as insured at the price set upon it by the vendors in the policies, and not at the price to which it had afterwards fallen: *Ralli vs. The Universal Marine Insurance Co.* (Lords Justices).¹

Power of Appointment.—A power in a marriage settlement, authorized two persons by deed "to be by them duly executed under their respective hands and seals, in the presence of, and to be attested by, two or more credible witnesses," to appoint a sum of money. The deed of appointment was signed by these two persons, their seals were attached thereto, and the attestation was in this form—"Signed, sealed, and delivered in the presence of G. B., E. C., clerks to Mr. S., solicitor, Cheltenham." This was held a sufficient attestation, and the power duly executed: *Newton vs. Rickets* (House of Lords).²

Trust and Trustee.—A bill was filed, by a married lady, by her next friend, seeking the removal of a trustee of her marriage settlement under the trusts of which she was entitled for life to the third part of the property settled, on the ground of dissensions between them, so that it was impossible they could act harmoniously together, and the Master of the Rolls made a decree for the removal of the trustee and the appointment of another; but upon appeal, the Lords Justices reversed that part of the decree, without prejudice to any question, whether the trustee should or should not at some future time be discharged from his office; their Lord-

¹ 31 L. J., Ch. 313.

² 31 L. J., Ch. 247.

ships considering it to be the duty of the court to ascertain to whom such dissensions were attributable: *Forster vs. Davies*.¹

PROBATE.

Administration.—The testamentary guardian has a right to administration for the use and benefit of minors, in preference to the guardian elected by them: *In the goods of Morris (deceased)*.²

COURT OF COMMON PLEAS.

Arrest.—An action will lie against a judgment-creditor for maliciously and without reasonable or probable cause indorsing a writ of *ca. sa.*, issued on such judgment, with directions to levy a larger sum than due, and causing the debtor to be arrested thereunder; and it is not necessary that the illegality of the arrest should have been ascertained before the action by the debtor's obtaining an order of a court or judge for his discharge from custody, as such illegality must depend altogether on the amount for which it was made being greater than the sum due, which is a fact to be only conclusively decided by a jury: *Gilding vs. Eyre*.³

COURT OF EXCHEQUER.

Bills and Notes.—An action may be brought by the holder of a banker's check payable to the bearer against the drawer, by the holder and indorsee against the maker and indorser of a promissory note, and by the holder against the acceptor of a bill of exchange, in the name of a third person who has no interest in any of the securities, and who has given no authority for the use of his name, and who is ignorant at the time of his name being so used of its use for that purpose,—if the holder indorse the promissory note and bill of exchange with the name of such third person; and, if such third person after action brought adopt and ratify the proceedings taken in his name, the defendant in such action cannot dispute his liability on the ground that the plaintiff was not the bearer of the check, the indorsee or lawful holder of the note, or the owner or lawful holder of the bill: *Ancona vs. Marks*.⁴

¹ 81 L. J., Ch. 276.

² 81 L. J., C. P. 174.

³ 81 L. J., Prob. & Mat. 80.

⁴ 81 L. J., Exch. 168.

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UNSOLVED PROBLEMS OF THE LAW, AS EMBRACED IN MENTAL ALIENATION.

All science has its unsolved problems. They originate in the remote fields of human research and investigation, near the boundary-line which affixes the limit to all human knowledge. They occur where new or hitherto unknown series of phenomena present themselves of so refractory a character as to refuse submission to the most comprehensive laws or sweeping generalizations which the human mind in its present stage of progress can by any possibility deduce or originate. They stand as ever-faithful sentinels on the outposts of human knowledge, defining the limits between the known and the unknown; witnesses to the mind's limited capacity; and admonishing that, until their solution is rendered possible, all beyond should be consigned to doubt and uncertainty, if not entirely handed over to marvel and mystery. One beautiful provision here, however, we cannot fail to notice, and that is, that the unsolved problems of one age are not those of another; that the laws and generalizations of each successive generation and century, becoming more comprehensive and sweeping, reach and successively solve those problems by reducing to

submission their refractory phenomena, thus moving on clearing up doubt and uncertainty, and banishing marvel and mystery, until another barrier is reached, and other unsolved problems telegraph back, that laws and generalizations still more comprehensive and sweeping, are required for their solution. Thus, in successive oscillations between the two, swings the mighty pendulum that marks the mind's progress on the dial plate of centuries.

What are the unsolved problems of the law? We propose only to discuss some that are involved in MENTAL ALIENATION—A Medico-Legal topic second to few others in general importance. As every thing included under this term consists of phenomena, it is difficult, if not impossible, to obtain a definition sufficiently comprehensive to include them all, and yet so distinctive as to create the proper limitation. That, which is perhaps the most unexceptionable, although not quite sufficiently distinctive, is the following, viz.: that it is “an aberration of the manifestations of the mind from their ordinary, normal, healthy state.” This, as well as most other definitions that have been proposed, regards the disease as psychological or mental, rather than as physiological or organic. The first problem that meets the medical profession, and demands of it a solution, regards the nature or seat of the difficulty. Is it a mental or moral disease, having its seat in the mind or soul; or is it a bodily disease to be referred to a suffering organ, the brain? Or is there some middle ground upon which the two can be united? Each one of these has its advocates, and the correct solution of it is of considerable importance to the medical profession, but not so much so to the legal. We shall not, therefore, enter into its discussion.

Mental Alienation, where it is shown to exist, is a disqualifying disease, and the next point of inquiry relates to the grounds upon which legal exemption proceeds, and the divisions in the disease which correspond to those grounds. The law being a rule of civil action, having its appropriate sanctions, requires two conditions to give it any moral efficacy in its applications. The one of these consists in the ability or mental capacity of those subject to it, requiring sufficient to comprehend the rule and the consequences

of its violation. The other renders it necessary, that those so subject, should be free moral agents, masters of their own actions, and capable of acting upon motives common to the race to which they belong. The absence of either one of these would necessarily free from all responsibility.

The two great divisions of mental alienation correspond precisely to these grounds of exemption. It is resolved primarily into two forms or classes; the first includes all those who are mentally alienated from defective development, or diminished power and activity of the faculties, while the second includes all those who are deranged from excessive action or undue excitement of the faculties. The first include all cases of idiocy, imbecility, and dementia; the second all the more active forms of mania or insanity. What we propose at present briefly to discuss relates to the means of identifying these different forms, and the application of legal principles to them—First, in relation to civil; second, as to criminal responsibility.

Of the three kinds embraced in the first class, or those whose aberration arises from defective development, that of *idiocy* is easily identified. It is not only congenital, but it deviates from the healthy condition in bodily structure and organs, while at the same time there is a marked deficiency in mental manifestation, all of which serve to divest the case of doubt and difficulty. *Imbecility* occurs subsequent to birth, and is of more difficult detection. It is of various grades or degrees, ranging from an intelligence little short of that which is normal and found in sound minds, down to the imbecile, who cut off the head of a man he found sleeping under a hedge, and then hid himself behind it, in order to witness the surprise of the body on its waking.

A German writer, Hoffbauer, has distinguished two forms of this, which he names *silliness* and *stupidity*; the first arising from defect of *reflective* power, the second from that of *perceptive*. He also assigns to each, different gradations or degrees. It is difficult to establish any certain test by which imbecility is to be recognised: those accustomed to witnessing it will generally be able to detect it. So the utter inability to display the ordinary amount

of mental power will reveal to all close observers, the existence of imbecility.

Dementia is characterized by a preternatural enfeeblement of the moral or intellectual power, or of both. It supervenes in a mind fully developed, is sometimes consequent on mania, mental shocks, or injuries of the brain, and sometimes first appears in old age. This is marked by a new feature, which has not hitherto appeared, viz., incoherence. Persons, places, times, and circumstances, are jumbled together. They occur disjointedly, succeeding each other without any regular order. Dissimilar objects are mistaken for each other. This, together with the evidences of general enfeeblement, and the marked change that has taken place in the individual, will render very little doubtful, any case that may present itself. When the dementia arises from a sudden mental shock, the disease frequently takes its hue from that which caused it; as in the case of the Norwegian fisherman, who being about meeting his bride in a boat, a sudden squall upset that containing her and her friends, who were all drowned. From that moment he became insane, and from morning till night, during the rest of his life, he was accustomed to sit upon a small stool, which he fancied a boat, with his arms and body constantly in the attitude of rowing, and admonishing every visitor to beware how he approached as the water was very deep.

The condition involved in idiocy, imbecility, and dementia, arises quite frequently for discussion and settlement in courts of law and equity. The first thing necessary is to establish the fact that such a condition exists. In *Jackson vs. King*, 4 Cowen, 207, and *Odell vs. Buck*, 21 Wend. 142, it is held, that where that condition alone is interposed as a defence, it must be clearly made out: that mere weakness of understanding is not, of itself, any objection in law to the validity of a contract; that the law draws no discriminating line by which to determine how great must be the imbecility of mind to render a contract void, or how much intellect must remain to uphold it; that if a man be legally *compos mentis*, he is the disposer of his own property, and his will stands for a reason for his actions. The condition must, therefore, be shown

to be *abnormal*, the defect *preternatural*, before it can be recognised by the courts.

But where there is an allegation of fraud, the parties may stop short of proving this condition or defect: 1 Story's Equity Jurisprudence, § 227. Thus, in *Blackford vs. Christian*, 1 Knapp's Rep. 73, Lord Wynford, after remarking that to impeach a conveyance on the ground of imbecility, required as strong a case to be made out as in a proceeding under a commission of lunacy to justify the placing of property and person under the protection of the Chancellor, proceeds to say—"but a degree of weakness of intellect far below that which would justify such a proceeding, coupled with other circumstances to show that the weakness, such as it was, had been taken advantage of, will be sufficient to set aside any important deed." And among other evidence, the nature of the act or deed itself is entitled to full consideration: 1 Story's Equity Jurisprudence, § 238. Thus the acts and contracts of persons of weak understandings, and who are thereby liable to imposition, will be held void in courts of equity, if the nature of the act or contract, together with its attendant circumstances, justify the conclusion, that the party has not exercised a deliberate judgment, but that he has been imposed upon, circumvented, or overcome by cunning, artifice, or undue influence: 1 Story's Equity Jurisprudence, § 250; *Gartside vs. Isherwood*, 1 Brown's Chancery Rep. 560-61.

Questions are frequently arising in the courts involving the testamentary capacity where this condition is alleged to exist. These are sometimes presented as purely questions of mental alienation, preternatural defect, or of weakness of mind upon which fraud and imposition have been practised. In reference to the former, various tests have been laid down. Thus, in 8 Mass. Rep. 372, the test proposed in the instruction to the jury, was the possessing of sufficient discretion for that purpose, and the ability at the time to recollect the particulars the testator had dictated. In *Van Alst vs. Hunter*, 5 Johns. Chan. Rep. 148, the Chancellor says: "The law looks only to the competency of the understanding. The failure of the memory is not sufficient to create the incapacity,

unless it be quite total, or extend to his immediate family and property." In *Clarke vs. Fisher*, 1 Paige, 171, Chancellor Walworth lays down the test, that the testator must be of sound disposing mind and memory, so as to be capable of making a testamentary disposition of his property with sense and judgment, in reference to the situation and amount of such property, and to the relative claims of the different persons who are, or might be, the objects of his bounty. The law seems inclined to admit that the testamentary capacity exists where there is a degree of mental imbecility that incapacitates for ordinary business. Thus, in 3 Wash. C. C. Rep. 587, Judge Washington says: "The capacity may be perfect to dispose of property by will, yet very inadequate for the management of other business, as to make contracts for the purchase and sale of property." He lays down the test to be, "if the testator has such a mind and memory as enable him to understand the elements of which a will is composed, the disposition of his property in its simplest form." The case which carries the testamentary capacity the furthest, is that of *Stewart's Executor vs. Lispenard*, 26 Wend. 255, in which the majority of the court say, that in passing upon the validity of a will, courts do not measure the extent of the understanding of the testator, and that if he be not totally deprived of reason, whether he be wise or unwise, he is the lawful disposer of his property, and his will stands as a reason for his actions.

The second class or division of the mentally alienated, includes all those whose derangement arises from excessive action, or undue excitement of the faculties. This embraces the more active forms of MANIA. "Here we have," says Dr. Guy, "a series of delusions, the offspring of some one excited passion or emotion, or one single delusion, the work of fancy, the interpretation of every sensation, the source of every thought, the mainspring of every action, holding every faculty in stern subjection, making the senses its dupes, the reason its advocate, the fancy its sport, and the will its slave; now whispering in the ear things unspoken, now painting on the eye things unseen; changing human beings at will into fiends or angels; converting every sensation into a vision; every

sound into articulate speech; the unreal world within in constant conflict with the real world without; understood of no one, yet believing himself to be comprehended by all; punished for the very actions which he supposes his tyrants to have commanded; controlled in everything which he thinks it his duty to perform. There is no wish, however presumptuous; no fancy, however monstrous; no action, however absurd; no crime, however heinous, that his delusion cannot create, prompt, and justify." Guy's Principles of Forensic Medicine, 328.

Without pausing here to distinguish between general and partial intellectual mania, I may say that the great distinguishing feature of both consists in the surrender of the mind to hallucination or delusion. The first inquiry here is, what is a *hallucination or delusion* which is sufficient to create insanity? Sir John Nicholl has defined it to be "a belief of facts which no rational person would have believed." This has been objected to by Lord Brougham, as giving a consequence for a definition. His Lordship offers as a substitute, "A belief of things as realities which exist only in the imagination of the patient." This is still more objectionable. It covers the hallucinations of the sane as well as those of the insane. Socrates had his demon, Luther had visits from the prince of darkness, and old Ben Jonson saw legions of devils dancing around his great toe. But neither of these were insane. They, and many others of the same character, were conscious that what appeared to them as hallucinations were really such, and not the realities to which their minds were bound to render allegiance. To make an *insane* hallucination it must not only be a reality existing only in the imagination of the patient, but it must also be a belief which to him is ordinary and normal, and to which he surrenders the homage of his actions.

These hallucinations are very diversified. The late Rev. Simon Brown for many years before his death, entertained the belief that he had lost his rational soul; that it had gradually perished, leaving only the animal life remaining. The late Rev. Daniel Haskell, for many years President of the University of Vermont, entertained the hallucination that he was dead, since some definite

epoch gone by ; that it was in some other world, not this, he formerly lived ; that he was there a rebel, and that hence God has removed him into another state, where he was then remaining. although it was a wonder and a mystery. See 15 *American Journal of Insanity*, 137. A lunatic at Wartsburgh supposed there was a person concealed within his belly, with whom he held frequent communications. Many have supposed themselves some distinguished person, as Mahomet, Louis XIV., Jesus Christ.

The important legal problem here is, where a single hallucination, rendering the case one of partial, not of general insanity, exists, what effect is it to have upon contracts or wills, made and executed during its continuance ? Is it to invalidate all contracts or wills so made, or only those which are brought within the sphere of its influence ? The latter was once clearly settled in English jurisprudence : *Dew vs. Clark*, 3 Addams Rep. 79, in which the question is very elaborately considered by Sir John Nicholl. But in a late case occurring in 1848, that of *Waring vs. Waring*, 6 Moore P. C. Cases, 349, Lord Brougham, before the Privy Council, delivered an opinion without dissent, as the judgment of himself, Lord Langdale, Dr. Lushington and Mr. T. Pemberton Leigh, inaugurating a totally different doctrine. See case referred to in *Wharton and Stillé's Medical Jurisprudence*, § and p. 17, and 6 *American Journal of Insanity*, 308. Lord Brougham says : " We are wrong in speaking of partial unsoundness ; we are less incorrect in speaking of occasional unsoundness : we should say that the unsoundness always exists, but it requires a reference to the peculiar topic, else it lurks and appears not. But the malady is there, and as the mind is one and the same, it is really diseased while apparently sound ; and really its acts, whatever appearance they may put on, are only the acts of a morbid or unsound mind." Thus the dogma of the mind's being a single general power, equally capable of acting in every direction, lies at the foundation, and has probably produced, as its fruits, the principle asserted in this case. The effect of it is to annihilate partial insanity ; or rather to transfer partial into general. Thus all who may chance to be laboring under an hallucination or delusion in reference to a particular subject, although

perfectly sane on all others, is, in virtue of the establishment of this principle, to be deemed legally incompetent to act at all. This seems at present to be settled law in England, but the doctrine of "insane on one point, insane on all," must certainly disfranchise multitudes who are now considered competent to discharge all the business relations of life.

No court in this country has adopted that principle. With us the establishment of a particular hallucination destroys the legal capacity of acting as to all those matters to which the hallucination relates; leaving still the capacity to act as to all such matters as are unaffected by it. Whenever, therefore, an act, as a will or a contract, is sought to be avoided on the ground of partial insanity, the first thing to be done is to establish the hallucination, which must be entertained as true, and must be false in fact. The next is to trace the act in question directly to the hallucination, either as being actually produced by it, or so intimately connected with it, as to lead to the presumption that it never would have occurred had not the hallucination existed: Dean's Medical Jurisprudence, 571.

An illustration of this is found in the case of *Johnson vs. Moore's Heirs*, 1 Littell's Rep. 371. There one George Moore, in the delirium of a fever, was led to entertain the delusive idea that his brothers were seeking to destroy him. The idea was without the shadow of a foundation. He recovered from the disease but the hallucination still remained, and under its influence he made his will, giving all his property to others. The court set aside the will.

Another point of considerable difficulty that often presents itself is the establishment of a LUCID INTERVAL. This question can never arise except in those cases where the fact of mania has been once established. The continuance of it is then to be presumed until proof of a state of sanity is offered. The medical profession are not entirely agreed as to alternations of insanity and reason. The possibility of their occurrence, however, cannot well be doubted, and the main question is what amount of proof shall be required to establish the fact of a Lucid Interval such as

the law requires to restore legal competency. The Chancellor D'Aguesseau in the case of the Abbe d'Orleans (see Evans' Pothier on Obligations, Appendix, 579), after considerable discussion, says: "it must be, not a mere diminution, a remission of the complaint, but a kind of temporary cure, an intermission so clearly marked, as in every respect to resemble the restoration of health."

The English Court of Chancery have substantially adopted the same views. In the *Attorney-General vs. Parthier*, 3 Brown's Chan. Rep. 234, Lord Thurlow says: "By a perfect interval, I do not mean a cooler moment, an abatement of pain or violence, or of a higher state of torture—a mind relieved from excessive pressure; but an interval in which the mind, having thrown off the disease, had recovered its general habit." He insists that the evidence in support of a lucid interval should be as strong and demonstrative of such fact as where the object of the proof is to establish derangement. That such evidence should go to the state and habit of the person, and not to what might be disclosed in an accidental interview, or to the circumstances attending a particular act. See also *White vs. Driver*, 1 Phil. 84, and *Groom vs. Thomas*, 2 Hagg's Eccl. Rep. 433, in the latter of which the doctrine laid down was that where there is not actual recovery, and a return to the management of himself and his concerns, by the unfortunate individual, the proof of a lucid interval is extremely difficult.

There are other legal investigations as to the mental condition besides those relating to the legality of a particular act. Both in England, and in most of the United States, a commission in the nature of a writ *de lunatico inquirendo* can at any time issue out of a court having competent jurisdiction, the object of which is to ascertain whether the individual mentioned in it is, or is not, capable of the management of his estate. The alleged cause of incapacity may arise either from mental unsoundness, or from habitual drunkenness. It is a proceeding instituted on the part of the friends of the alleged lunatic, and if successful, results in the appointment of a committee of the person and estate, who is or are, legally authorized to act for him in all matters relating to his estate. The writ issues to certain named commissioners, who

are directed by means of a jury to inquire into and find the fact as to capacity, and to return their inquisition to the court out of which it issued.

A point of much importance has arisen here as to whether the finding must be limited to the fact of lunacy, and the incapacity consequent thereupon, or whether it may relate to incapacity generally, such, for instance, as may arise from old age and mere mental weakness. In *Ex parte Barnsley*, 3 Atk. 168, a commission issued to inquire whether Barnsley was a lunatic, and the inquisition found that from weakness of mind he was incapable of governing himself and his estate. Lord Hardwicke held that the inquisition must be quashed for insufficiency, in that it had not found the fact of lunacy. The same doctrine was subsequently declared in *Lord Donegal's Case*, 2 Vesey 407. A deviation from this strict rule is made by Lord Eldon in 6 Vesey 273, in which he says it is sufficient that the party is incapable of managing his own affairs. The subject also underwent further investigation in *Ridgeway vs. Darwin*, 8 Vesey 65, and in *Ex parte Cranmer*, 12 Vesey 445. Lord Erskine held that the jurisdiction of the Chancellor embraced cases of imbecility resulting from old age, sickness, or other causes. The question he said was whether the party had become mentally incapable of managing his affairs.

In the courts of New York the point has several times been presented, as *In the matter of Barker*, 2 Johns. Chan. Rep. 232, *In the matter of Wendell*, 1 Johns. Chan. Rep. 600, and *In the matter of Mason*, 1 Barbour's Supreme Court Rep. 436, in which is very fully sustained the sufficiency of an inquisition finding the person of unsound mind and mentally incapable of managing his affairs.

Under these rulings of the Courts it is obvious that every species of mental alienation, with the exception perhaps of the moral or impulsive kind, may come up for consideration in these proceedings. In cases of preternatural defect in the power of mental manifestation, it may in most cases be easy to determine. The difficult cases are those of hallucination or delusion, where it is of

a character interfering little, if at all, with the ordinary pursuits of life. The points to be ascertained in such case are

1. What is the special hallucination entertained? what its peculiar nature and character? what its range of object, and the limits within which it operates?

2. How does the hallucination affect the ordinary business pursuits of life? Does it so absorb the action of the mental faculties as to prevent them from being sufficiently occupied in the plans and purposes of life? Is it of a character to lead to profitless investments of capital? Does it in any way tend to interfere with life's ordinary avocations so far as to prevent them from being reasonably followed and attended to? Does it render the party incapable of managing his own affairs, so far that they are likely to suffer materially in consequence of it? If so, the inquisition should return him a lunatic. But if it be of a character such as little, if at all, affects his ordinary business; leaving him, for all business purposes, the self-direction of his affairs, he may still be left in the possession of his own property, allowing his own volition to stand as a reason for his actions. A. D.

JURY TRIALS.

RIGHT TO DISCHARGE FOR DISAGREEMENT; EFFECT OF DISCHARGE, IN CRIMINAL CASES. THE ALLEGED PRACTICE OF CARTING JURIES, IN ENGLAND, QUESTIONED BY LORD LYNTHURST. THE AMERICAN AND ENGLISH CASES CONSIDERED.

The question has lately been raised in England in regard to the effect of discharging the jury, in criminal cases. This subject was much doubted and discussed, at the American Bar, not many years since, but, of late, there seems to have been a pretty general acquiescence in the right of the courts to discharge juries, in their discretion, and we are not aware that any distinction has obtained of late, in regard to the right to exercise that discretion, in ordi-

nary criminal, as well as in civil causes. The distinction may have been urged, at the bar, in argument, and it may have been adopted by the courts, in some cases; but we have no such in mind. In the following cases, the discharge of the jury in a criminal case is held to be matter of discretion with the court: *The People vs. Green*, 13 Wendell 55; *People vs. Denton*, 2 Johns. Cas. 275; *People vs. Olcott*, Id. 301; *Hector vs. State*, 2 Miss. R. 166. We shall recur to this point again.

But the English courts, of late, have had this matter more than once under consideration, and the views there entertained seem to be somewhat at variance with the general practice in this country, as stated above. In *Regina vs. Charlesworth*, 1 B. & S. 460, where the respondent was indicted for bribery at an election for member of parliament, at the trial before HILL, J., the principal witness for the crown refused to give evidence, and was committed for contempt of court. The counsel for the crown moved the judge to postpone the trial and discharge the jury, as it was impossible for them to proceed, without the testimony of the witness now committed for refusal to testify. The motion was opposed, on the ground that the court had no such discretion. HILL, J., after consulting with KEATING, J., said he had determined to discharge the jury, and postpone the trial, and should place the fact, with the reason for it, upon the record; that it might be determined, whether he had such power, and added, "If he had the power, he ought to exercise it, where a witness had wilfully tampered with the ends of justice." A rule for discharging the respondent having been obtained, it was argued at very great length by several counsel on each side, and a large number of authorities, both ancient and modern, many of them of the most conflicting character, were cited. The judges of the King's Bench took time to consider, and ultimately delivered judgments, seriatim, and of a very elaborate character.

Upon the general question of the effect of the judge discharging the jury, in a case of misdemeanor, improperly, and against the will of the respondent, after the trial had begun, the court came to the conclusion, that it did not entitle the respondent to be dis-

charged also, as upon a virtual acquittal. This would seem to be the only rational conclusion in regard to the question; the only wonder is, that, at this late day, it could have been brought so seriously in question before that court. But there is some ground of surprise, as it seems to us, that the court there should have considered that the exercise of such a discretion, in the particular case, was not warranted, "unless, perhaps, it could be shown that the absence of evidence," on the part of the prosecution, "was occasioned by collusion between the witness and the accused." This remark may apply, with considerable force, to the general right of asking to have the jury discharged, on the ground of the unexpected absence of a material witness, after the trial began; but if such defect of evidence was the result of causes wholly beyond the control of the utmost watchfulness on the part of the prosecution, as if a witness was suddenly smitten with severe sickness, coming into court, or waiting his turn, in court, or had gone out of court, in defiance of the subpoena, or, as in the case before the court, obstinately refused to give evidence; it would certainly savor of unwonted strictness and severity, to discharge the respondent, before it could be known what was the cause of the defect of evidence, or whether it was likely to be soon removed, or not.

The decision of the main question here is in accordance with that of the Central Criminal Court, in *Regina vs. Davidson*, 2 F. & F. 251. In the last case, which was an indictment for an indecent assault, the respondent pleaded, that he ought not to be further prosecuted, because he had been once tried for the same offence and the jury discharged. To this it was replied, on the part of the crown, "that the jury having deliberated for a long space of time, and being unable to agree, were discharged by the court in the exercise of its discretion." The court held the plea bad.

But in the trial of the case of *Regina vs. Charlesworth*, Crompton, J., made some very pertinent remarks in regard to a practice, which has become a serious cause of embarrassment in the administration of justice, upon both sides of the Atlantic, within the last

few years (1 B. & S. 523), as follows: "I think that the practice of discharging the jury, too soon, is objectionable. It is said they should be discharged, if the judge sees that they are not likely to agree. I think we should take some mean course. It is a dangerous thing to say that the jury should be discharged, in a certain time, or in a few hours. I think that they should be kept, not to coerce them, but for such a time, as that they should not be able to say, 'We need not agree in a verdict; we will wait for such a time and then we shall be discharged.' Therefore I do not reprobate the old practice of confining a jury for a reasonable time. Confining them without meat, drink, and fire, and exposing them to hunger, thirst, and cold, is a barbarous relic of ancient times, and should be got rid of. But I think they should be kept a reasonable time, so that they may not wait for their discharge, in order to avoid giving a verdict unpleasant to their feelings."

The question in regard to the effect of discharging the jury, in cases of felony and treason, seems not to have been settled in the English courts. But in the case of *Conway and Lynch vs. Regina*, 7 Irish Law Rep. 149, which was a case of felony, it was decided, three judges against one, that the discharge of the jury, by a single judge, in such a case, might be pleaded in bar to a future indictment for the same offence. But it seems to be the general voice of all the early law writers, in England, and the admitted tradition of the law, "that a jury sworn and charged in a capital case, cannot be discharged, (without the prisoner's consent,) till they have given a verdict. And notwithstanding some authorities to the contrary in the reign of King Charles II., this hath been held for clear law, both in the reign of King James II. and since the revolution:" 2 Hawk. Pl. Cr. Ch. 47, § 1; Co. Litt. 227 b; 3 Inst. 110. And by some of these ancient authors the same rule is extended to all felonies. What is here intended by "charged" refers to the committing the prisoner to the jury for trial, which was, and probably is now, done in a formal manner, in the English courts, at the beginning of every trial for felony, and has no reference to the summing up of the judge. But Lord Hale, 2 I. Pl. Cr. 294, 295, lays it down, as every day practice in the

English courts, to discharge the jury, after the trial had advanced so far as clearly to indicate to the court, the atrocious guilt of the prisoner and the probable existence of further evidence, showing such guilt; and order a trial at a future term. 3 Bac. Ab. tit. "Juries," Letter G. 769.

We have before incidentally alluded to the American rule upon this subject, that in ordinary criminal cases, not above the grade of misdemeanor, it rests in the sound discretion of the court when they will discharge the jury, and order a new trial, either immediately or at a future term. These questions have often arisen in regard to discharging a single juror, who was disqualified from further acting in the case, either on account of some disability occurring during the trial, or of one existing but not brought to the knowledge of the court, before the juror was impanelled. This was so ruled in *People vs. Damon*, 13 Wendell 351. This was questioned in *Garrat vs. Garrat*, 4 Yeates 244, and in *State vs. Williams*, 3 Stew. 454. And in *Hines vs. The State*, 8 Humph. R. 597, it is decided, that if the court discharge a single juror after he has been designated for the trial of a criminal case, without legal grounds, the respondent will be entitled to a *venue de novo*. But this may be legally done, on account of physical inability in the juror to act in the trial: 6 Humph. R. 249.

But many of the American courts hold, that in capital cases it is no sufficient ground for discharging the jury, without the consent of the respondent, that the jury are unable to agree upon a verdict; and that if the jury is so discharged, it is a bar to any further prosecution for the offence: *Commonwealth vs. Clue*, 3 Rawle 498; *State vs. Ephraim*, 2 Dev. & Batt. 162; *Commonwealth vs. Cook*, 6 S. & R. 577; *Williams's Case*, 2 Grattan 567.

Many of these cases, however, hold that where there is an invincible necessity for discharging the jury, a necessity which may fairly be said to be beyond and above the control of any mere human agency, both in its inception and its progress, and which precludes absolutely the attainment of a verdict, the jury must be discharged, even in capital causes, and that such discharge is no bar to further prosecution for the same offence: *Commonwealth vs.*

Clue, supra; *State vs. Ephraim, supra*. In this last case, RUFFIN, C. J., said: "The jury cannot be discharged without the personal consent of the accused, but for some evident, urgent, overwhelming necessity, arising from matter accruing during the trial, and which was beyond human foresight or control; and, generally speaking, such necessity must be set forth in the record: *Spier's Case*, 1 Dev. 491, in which TAYLOR, C. J., says, "That all the exceptions ought to be confined to those cases of extreme and positive necessity which are dispensed by the visitation of God; and which cannot by any contrivance of man be made the engines of obstructing that justice, which the safety of all requires should be done to the state." In *Commonwealth vs. Clue, supra*, GIBSON, C. J., said: "The court may discharge the jury of a prisoner capitally indicted, only in case of absolute necessity, to establish which it is necessary that there be some other ingredient beside mere inability to agree." In the case of *United States vs. Haskell and Francois*, 4 Wash. C. C. R. 402, it is held, that insanity in one of the jurors, appearing after the jury had been kept together three days, and more than twenty-four hours without refreshment, was good ground for discharging the jury in a capital cause, and that such discharge of the jury is in the discretion of the court, and is no bar to further prosecution. In this cause the grounds of the discharge of the jury were entered in form upon the record.

In the case of *United States vs. Perez*, 9 Wheaton R. 579, it is decided, that the discharge of a jury from giving a verdict in a capital cause, without the consent of the prisoner, the jury being unable to agree, is not a bar to a subsequent trial for the same offence. STORY, Justice, said: "The prisoner has not been convicted or acquitted, and may be again put upon his defence. We think, in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, as the ends of public justice would otherwise be defeated."

And in *The People vs. Goodwin*, 18 Johns. R. 188, it was decided, that in cases of felony or misdemeanor, if the jury, after

deliberating so long as to exclude all reasonable expectation that they will be able to agree in a verdict, "unless compelled to do so by famine or exhaustion," are discharged, it will be no bar to further prosecution for the same offence. In this case the jury had been out seventeen hours, and were discharged within half an hour of the time when by law the court was bound to close its session. In the case of *People vs. Green*, 18 Wendell 55, the same rule was applied to a similar case, except that the jury were discharged after one-half hour's deliberation, and when there was no restriction in regard to the time of adjournment of the court, it being regarded as a matter absolutely within the discretion of the court. The same view is taken in *Commonwealth vs. Bowden*, 9 Mass. R. 494. The jury here had "been confined together during part of a day, and a whole night, and returned into court and informed the judge, that they had not agreed upon a verdict, and that it was not probable they ever could agree." One of the jurors was accordingly withdrawn, and the panel discharged, and the prisoner tried again, by another jury, during the same term, and convicted, and the question came up on motion in arrest of judgment. And in *Commonwealth vs. Purchase*, 2 Pick. R. 521, on a capital trial, the jury were discharged, after a deliberation of eighteen hours, it appearing to the court that there existed a difference of opinion among them upon the evidence, which any further deliberation would have no tendency to remove, and it was held no bar to further prosecution, and the prisoner was subsequently tried and convicted of manslaughter, and it was held a good conviction.

It is well settled, in the American courts, that one cannot be said to have been put in "jeopardy of life or limb," within the meaning of the United States constitution, unless he has been either convicted or acquitted of the offence, so that the facts will constitute a good plea of *autrefois acquit*, or *autrefois convict*, which is only true, when there was both verdict and judgment shown: 4 Black. Comm. 385; 1 Chitty Crim. Law 372; WASHINGTON, J., in *United States vs. Haskell*, *supra*; SPENCER, C. J., in *The People vs. Goodwin*, *supra*.

The case of *United States vs. Coolidge*, 2 Gallison 364, is pre

cisely the same case in principle, as the late English case of *Regina vs. Charlesworth*, *supra*, being a case of penalty or misdemeanor, and an indispensable witness for the prosecution being committed by the court for contempt, in refusing to give testimony, and the jury discharged, and the cause postponed. Mr. Justice STORY held, as HILL, J., did in the English case, that this was good ground for postponing the trial, and discharging the jury. On this point, it seems to us, the decision of these judges is more in consonance with reason and principle than that of the King's Bench, that it was not good ground for postponing the trial. But both decisions concur in the legal effect of such postponement, that it is no bar to further prosecution, being in the discretion of the court.

The American cases seem to agree in one respect, that a jury cannot be discharged, in a capital case, and ought not to be in any criminal case, except upon the strict ground of necessity. But there is not the same concurrence in regard to the matter resting altogether in the discretion of the court before whom the trial is had, and not being subject to revision upon errors. The English courts concur with the majority of the American courts, that the question of necessity is one of fact, and that the decision of the court before whom the question first comes is final. This seems to us the only practicable rule upon the subject. For the disagreement of a jury, which ought, we think, in all cases, civil or criminal, to be regarded as not being one of necessity for a discharge, until pushed to the utmost limit of reasonable hope, or until the jury become desperate, and incapable of further effort, without unreasonable pressure and constraint, may nevertheless become a cause of real, infallible necessity, as much as sickness or insanity; and it must then be treated in the same manner as any other necessity, and the court before whom the trial is had is the only proper tribunal to determine this necessity, and their decision cannot be reversed on error, because, in the nature of things, it is impossible to state all the facts and circumstances in the case, precisely as they appear in the court below. The discharge of the jury, therefore, in a criminal cause, ought not to be regarded as a bar to further prosecution, unless it appear clearly that it was for

insufficient reasons, and when no legal necessity existed in the case for such a course, as was held in *State vs. Waterhouse, Mart. & Yerg.* 278.

Some curious discussions have lately arisen in England and Ireland, in the cases already named, and in a debate in the House of Lords in which Lord Lyndhurst took part, in regard to the fact of the jury having even been *carted* about the circuit, as matter of indignity to them, by way of punishment for not performing their duty, as it has been alleged was done in ancient times in those countries. His lordship insists that no such thing ever occurred in England, although it is admitted to have occurred in Ireland within the memory of man, but that the tradition arose from the misconstruction of the abbreviation "en charr." which really meant a covered wagon instead of an open cart, and that the jury were carried along with the judge of the circuit, in the usual and most comfortable mode of travel in that day, in order to give them more ample opportunity to digest the case, and ultimately to come to an agreement! We have no confidence in these modern glosses upon ancient traditions. The text is far more reliable than the commentary. But all must rejoice that such a barbarous practice is not only discontinued, but that the disfavor with which it is now viewed is fast bringing the belief of its former existence into question.

We should venture to say more in regard to the policy of discharging juries in cases committed to them, both civil and criminal, after a short consultation, and the assurance of the foreman, that they will not be likely to agree, if we supposed it would be useful. We believe this practice to be a vicious one every way, and that it has done more than any one thing else, to bring jury trials into disrepute, in this country. And when it is considered that the law nowhere provides for any such thing as the discharge of a jury, for disagreement, and that the practice has grown up out of the necessities incident to that mode of trial, we must all feel, that such a practice, resting upon mere necessity, "which knows no law," should be carefully restricted within the narrowest limits possible. And we think the discharge of the jury ought not to be referred to the consent of the parties, exclusively, as was formerly

the practice in the American courts to a great extent. This practice enables the parties to control the business of the courts, in important particulars, in regard to which other suitors have an important interest. And it enables the parties to bid against each other in open court, often, for showing deference and indulgence to the opinions and feelings of the jurors, which is an undignified and unworthy practice, and one not to be encouraged. The judge should hold all these matters under his own control, and if he is fit for his place, he will do it, with a firm but gentle hand, so that the course of justice will be quiet and easy, but ever onward; so that it will soon come to be the feeling of every one about him that the business *must* be finished, and that it is just as likely to be well done, by the first jury, as any other, and that as the law has established this mode of trial, requiring the unanimous verdict of twelve men, it expects compromise and concession, and that such qualities of mind, instead of being evidence of mental imbecility, are more creditable on the score of wisdom and judgment, than that dogged obstinacy of opinion, which is more commonly the result of weakness, or inexperience, than of anything else. We do not believe there would occur the necessity of discharging a jury, one time in a thousand, if the courts had the capacity to make the bar, and the public, comprehend and feel, that such a result, instead of being creditable to any one, evinced great want of capacity in the jury as well as the court, and reflected no special credit upon the counsel. But as long as those concerned in the trial of causes are content with *trying* to try causes, and feel themselves in no manner discredited by such a result, by the failure to accomplish any good, the evil will be likely to continue. But if the evil should increase in the same ratio it has done for some years past, it would soon render jury trials unendurable, and drive them out of practice, as it already has done, to a great extent, in some localities. And this is a result which all well-wishers to the jurisprudence of the country should deprecate. For, with all its evils, the jury trial, even in civil actions, is an important security to the peace and good order of any country, so perfectly free from governmental constraint as America has thus far been.

I. F. R.

*In the New York Court of Appeals.*THE PEOPLE, *ex rel.* HACKLEY, vs. KELLY, ETC.,

AND MATTER OF ANDREW J. HACKLEY.

The Constitution (Art. 1, § 6,) does not protect a witness in a criminal prosecution against another, from being compelled to give testimony which implicates him in a crime, when he has been protected by statute against the use of such testimony on his own trial.

That the information thus elicited facilitates the discovery of other evidence by which the witness may be subsequently convicted, is an incidental consequence against which the Constitution does not guard him. Its prohibition is simply against his being required to give evidence where he himself is upon trial.

The refusal of a witness to answer a proper question before a grand jury, is punishable as a contempt under the statute (2 R. S., p. 584, § 1, p. 735, § 14), as committed in a proceeding upon an indictment.

When the refusal was reported by the grand jury to the court in the presence of the witness, who did not deny but justified the same, and reiterated the refusal, the contempt is one "in the immediate view and presence of the court," and no affidavit or further evidence is requisite to a commitment.

The appellate court, before which the propriety of a commitment for contempt is brought by *certiorari*, or even collaterally on *habeas corpus*, is bound to discharge the prisoner where the act charged as criminal is necessarily innocent or justifiable, or where it is the mere assertion of a constitutional right.

The adjudication of the court in which the alleged contempt occurred, while conclusive that the party committed the act whereof he was convicted, and of its character when that might, according to the circumstances, be meritorious or criminal, cannot establish as a contempt that which the law entitled the party to do.

The first of these cases is an appeal from a judgment of the Supreme Court, by which Hackley, the relator, was remanded to the custody of the sheriff, after a hearing of his case upon a return to a writ of *habeas corpus*, issued at his instance to the said sheriff. The other is an appeal from the judgment of the same court, dismissing a *certiorari* which Hackley had procured to be issued to the Court of General Sessions of the city and county of New York, to review an order of that court, adjudging him guilty of a criminal contempt, and to be imprisoned there for the term

of thirty days; from which imprisonment it was also the purpose of the *habeas corpus* to relieve him. The object of the proceeding in both cases was to determine the legality of the conviction of Hackley for a contempt.

The record of the Court of Sessions, set out in the return to the *habeas corpus* and in the return to the *certiorari*, was as follows: At a court of general sessions of the peace, holden in and for the city and county of New York, &c., April 31, 1861. Present, JOHN T. HOFFMAN, Recorder. In the matter of Andrew J. Hackley.

The grand jury, heretofore in due form selected drawn, summoned, and sworn to serve as grand jurors, to serve in the court of general sessions of the peace, in and for the city and county of New York, come into court and make complaint by and through their foreman, theretofore duly appointed and sworn, that Andrew J. Hackley, after being duly summoned and sworn, as prescribed by law, as a witness in a certain matter and complaint pending before such grand jury, whereof they had cognisance against certain aldermen and members of the common council of the city of New York, for feloniously receiving a gift of money, under an agreement that their votes should be influenced thereby in a matter then pending before said aldermen and members of the common council in their official capacity, did then and there refuse to answer the following legal and proper interrogatory, propounded to him, the said Andrew J. Hackley, to wit: "What did you do with the pile of bills received from Thomas Hope, and which he told you amounted to fifty thousand dollars?" And the said Andrew J. Hackley then and there, instead of answering the said interrogatory, stated as follows, to wit: "Any answer which I could give to that question would disgrace me, and would have a tendency to accuse me of a crime. I therefore demur to the question, referring to the ancient common law rule, that no man is held to accuse himself, and to the sixth section of the first article of the constitution of this state." And the court having then and there decided that the said interrogatory is a legal and proper one, and that the reasons given by the said Andrew J.

Hackley for not answering the same are invalid and insufficient, and now ordering the said Andrew J. Hackley to answer the said interrogatory, and he, the said Andrew J. Hackley, still contumaciously and unlawfully refusing to answer the said interrogatory, the court doth hereby adjudge the said Andrew J. Hackley, by reason of the premises aforesaid, guilty of a criminal contempt of court; and doth further order and adjudge the said Andrew J. Hackley, for the criminal contempt aforesaid, whereof he is convicted, be imprisoned in the jail of the county for the term of thirty days.

Hackley appealed from the judgment of the Supreme Court in both cases.

James T. Brady and *Amasa J. Parker*, for the appellant, maintained that the provision in the constitution, which declares that no person "shall be compelled in a criminal case to be a witness against himself," should not be limited to testimony in criminal prosecutions against the party, but that, by a proper and necessary construction, it should be held to protect every person from being required to give testimony in any case, the tendency of which would be to accuse him of a crime; and, if the rule could be affected by legislation, that it was not enough that he should be guarded against having his testimony given in evidence, as his admission, in a prosecution which might be afterwards brought against him, as was done by the statute relied on, but that he should be wholly protected against any prosecution for the offence; inasmuch as his testimony might disclose facts and circumstances which, being thus ascertained, might be proved against him by testimony other than his sworn admission. They also insisted that the commitment was void on its face, because the Revised Statutes did not make a refusal to testify before a grand jury a contempt; and, also, that the commitment did not show that his misconduct was committed in the immediate view and presence of the court, or that the facts were proved by affidavit served on the accused, with a reasonable time given him to make his defence.

J. H. Anthon, for the respondent, besides controverting those

positions, argued that the propriety of the commitment could not be examined upon the return to a writ of *habeas corpus*.

The opinion of the court was delivered by

DENIO, J.—As a general rule, the propriety of a commitment for contempt is not examinable in any other court than the one by which it was awarded. This is especially true where the proceeding by which it is sought to be questioned is a writ of *habeas corpus*; as the question on the validity of the judgment then arises collaterally, and not by the way of review; and the *habeas corpus* act, moreover, declares that where the detention of the party seeking to be discharged by *habeas corpus* appears to be for any contempt, plainly and specially charged in the commitment, ordered by a court of competent jurisdiction, he shall be remanded to the custody in which he was found. But this rule is of course subject to the qualification, that the conduct charged as constituting the contempt must be such, that some degree of delinquency or misbehavior can be predicated of it; for if the act be plainly indifferent or meritorious, or if it be only the assertion of the undoubted right of the party, it will not become a criminal contempt by being adjudged to be so. The question whether the alleged offender really committed the act charged, will be conclusively determined by the order or judgment of the court; and so with equivocal acts, which may be culpable or innocent according to the circumstances; but where the act is necessarily innocent or justifiable, it would be preposterous to hold it a cause of imprisonment. Hence, if the refusal of Mr. Hackley the relator, to answer the question propounded to him, was only an assertion of a right secured to every person by the constitution, it was illegal to commit him for a contempt; and this error was certainly reached by the *certiorari*, if not examinable on the return to the *habeas corpus*.

On the other hand, if the case was such that he was obliged, by law, to answer the inquiry, the power of the court to punish him for his refusal was undoubted. If the case is not reached by the statute, the power would be ample at the common law. But I am

of the opinion that the statute applies to the refusal of a witness to answer a legal question put to him by the grand jury, to the same extent as though he were called to give testimony on the trial of an issue before the court or a petit jury. The act declares that courts of record have power to punish by fine and imprisonment any misconduct by persons summoned as witnesses, for refusing to be sworn or to answer as such witnesses: 2 R. S., p. 534, § 1, subd. 5. But the title of the Revised Statutes in which this is found relates primarily to proceedings in civil cases. By another provision, however, the enactment just mentioned, together with several other directions relating to trials in civil cases, are declared to extend to trials and other proceedings on indictments, so far as they may be in their nature applicable thereto: 2 R. S., p. 738, § 14. The criticism of the appellant's counsel is, that the examination of a witness before a grand jury is not a proceeding upon an indictment, and so not within the statute. In one sense it is not. But by the theory of proceedings in criminal cases, the indictment is suffered to be prepared and taken before the grand jury by the counsel prosecuting for the state; and the evidence is then given in respect to the offence charged in it. If the party accused appears to be guilty, the indictment is certified to be a true bill: otherwise, it is thrown out. In that view of the practice, all which takes place before the grand jury, as well as the subsequent steps, may be said to be proceedings upon the indictment.

It is further urged on the part of the relator, that the conviction is erroneous because it does not appear that the contempt was committed in the presence of the court, and that there was no proof by affidavit, as required by the statute: 2 R. S., p. 535, §§ 2, 3. It appears by the record returned, that the relator and the grand jury being present in open court, it was stated on the part of the jury that the relator had declined to answer the inquiry touching the disposition of certain moneys which had come to his hands, basing his refusal upon the constitutional provision. The question being thus presented for the determination of the Court of Sessions, it held that the constitutional provision did not apply,

and the relator was thereupon directed to answer the interrogatory as required by the grand jury. It is not to be understood that the order was to proceed with the examination on the spot. What was said was for the purpose of settling the rights and duties of the witness and of the jury, when they should be again convened in the grand jury room. The witness might have postponed his election whether he would obey or not, until the examination before the jury was resumed ; but he chose, as was doubtless the most convenient course, to declare his determination at once. He thereby waived the formality of having the question repeated in the jury room, and the court was at liberty to act, as it did, upon that waiver. The refusal of the prisoner to give testimony in answer to the contested question was made in the face of the court. If such refusal was a contempt, such contempt was committed "in the immediate view and presence of the court;" and it was authorized by the statute to act without further evidence.

But if it were necessary to proceed under the other branch of the statute, and to prove to the court the transaction before the grand jury, the conviction would not be even erroneous. The relator and the jury being present, the latter reported the particulars of the controversy of the relator, including his reasons for refusing to answer. It does not appear that it was claimed by him, or that he asked for time to refute what was alleged against him. On the contrary, when informed that it was his duty to answer, he, as the record states, still refused to answer. The whole of these proceedings assume that the statement of the jury was conceded by all the witnesses to be a correct account of what had transpired up to that time. The appearance of the relator before the court must have been gratuitous ; for there is no statement that any notice had been given or any process issued. His voluntary appearance and his persistence in the course which it was alleged he had taken before the grand jury, was an implied admission of the facts, and a waiver of further time to defend himself. It is apparent that the question was presented in a manner somewhat informal, but which was assented to by the

parties, in order to have a prompt determination of the constitutional question involved.

There seems, therefore, to be nothing to preclude us from examining the main question, whether the relator could lawfully refuse to answer the interrogatory put to him.

The bribery act of 1853, declares the giving to or receiving money, &c., by any or divers public officers named, including any member of the common council of a city, with a view to influence their action, upon any matter which may come officially before them, an offence punishable by fine and imprisonment in a state prison. For the purpose of enabling the public to avail itself of the testimony of a participator in the offence, the fourteenth section provides as follows: "Every person offending against either of the preceding sections of this article shall be a competent witness against any other person so offending, and may be compelled to appear and give evidence before any magistrate or grand jury, or in any court in the same manner as other persons; but the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying:"

Ch. 539. A similar provision is found in an act to amend the charter of the city of New York, passed in 1857. The fifty-second section relates to bribes of the members of the common council and the officers of the corporation; making the giving and the receiving of bribes highly criminal, and concluding with an enactment substantially similar to the fourteenth section of the act of 1853. The design was to enable either party concerned in the commission of an offence against the act, to be examined as a witness by the grand jury or public officer intrusted with the prosecution. The question to be determined, is whether these provisions are consistent with the true sense of the constitutional declaration, that no person shall be compelled in any criminal case to be a witness against himself: Art. 1, § 6.

The primary and most obvious sense of the mandate is that a person prosecuted for a crime shall not be compelled to give evidence on behalf of the prosecution against himself in that case. It is argued, that no such narrow and verbal construction can

have been in the view of the authors of the article, for the reason that no such atrocious proceeding as that supposed has been tolerated in civilized countries in modern times. But constitutional provisions are not levelled solely at the evils most current at the times in which they are adopted, but while embracing these, they look to the history of the abuses of political society in times past, and in other countries; and endeavor to form a system which shall protect the members of the state against those acts of oppression and misgovernment which unrestrained political or judicial power are always and everywhere most apt to fall into: See observations of Chief Justice SPENCER on this subject, reported in 18 John. 202. The history of England in early periods, furnishes abundant instances of unquestionable and cruel methods of extorting confessions; and the practice at this day in the criminal tribunals of the most polished countries in continental Europe, is to subject an accused person to a course of interrogatories which would be quite revolting to a mind accustomed only to the more humane system of English and American criminal law. It was not, therefore, unreasonable to guard by constitutional sanctions against a repetition of such practices in this state; and it is not at all improbable that the true sense of the provision in question corresponds with the natural construction of the language. But there is great force in the argument that constitutional provisions, devised against governmental oppressions, and especially against such as may be exercised under pretence of judicial power, ought to be construed with the utmost liberality, and to be extended so as to accomplish the full object which the author apparently had in view, so far as it can be done consistently with any fair interpretation of the language employed. The mandate that an accused person should not be compelled to give evidence against himself, would fail to secure the whole object intended, if a prosecutor might call an accomplice or confederate in a criminal offence and afterwards use the evidence he might give, to procure a conviction on the trial of an indictment against him. If obliged to testify on the trial of the co-offender to matters which would show his own complicity, it might be said upon a very

liberal construction of the language that he was compelled to give evidence against himself, that is, to give evidence which might be used in a criminal case against himself. It is perfectly well settled that where there is no legal provision to protect the witness against the reading of the testimony on his own trial, he cannot be compelled to answer: *The People vs. Mather*, 4 Wend. 229, and cases there referred to. This course of adjudication does not result from any judicial construction of the constitution, but is a branch of the common law doctrine which excuses a person from giving testimony which will tend to disgrace him, to charge him with a penalty or forfeiture, or to convict him of a crime. It is of course competent for the legislature to change any doctrine of the common law, but I think they could not compel a witness to testify on the trial of another person to facts which would prove himself guilty of a crime without indemnifying him against the consequences, because I think, as has been mentioned, that by a legal construction, the constitution would be found to forbid it.

But it is proposed by the appellant's counsel to push the construction of the constitution a step further. A person is not only not compellable to be a witness against himself in his own cause, or to testify to the truth in a prosecution against another person where the evidence given, if used as his admission, might lead to convict himself if he should be afterwards prosecuted, but he is still privileged from answering, though he is secured against his answers being repeated to his prejudice on another trial against himself. It is no doubt true that a precise account of the circumstances of a given crime would afford a prosecutor some facilities for fastening the guilt upon the actual offender, though he were not permitted to prove such account upon the trial. The possession of the circumstances might point out to him sources of evidence which he would otherwise be ignorant of; and in this way the witness might be prejudiced. But neither the law nor the constitution is so sedulous to screen the guilty as the argument supposes. If a man cannot give evidence upon the trial of another person without disclosing circumstances which will make his own guilt apparent or at least capable of proof, though his account of

the transactions should never be used as evidence, it is the misfortune of his condition and not any want of humanity in the law. If a witness objects to a question on the ground that an answer would criminate himself, he must allege, in substance, that his answer, if repeated as his admission on his own trial, would tend to prove him guilty of a criminal offence. If the case is so situated that a repetition of it on a prosecution against him is impossible, as where it is forbidden by a positive statute, I have seen no authority which holds or intimates that the witness is privileged. It is not within any reasonable construction of the language of the constitutional provision. The term criminal case, used in the clause, must be allowed some meaning, and none can be conceived other than a prosecution for a criminal offence. But it must be a prosecution against him, for what is forbidden is that he should be compelled to be a witness against himself. Now if he be prosecuted criminally touching the matter about which he has testified upon the trial of another person, the statute makes it impossible that his testimony given on that occasion should be used by the prosecution on the trial. It cannot, therefore, be said that in such criminal case he has been made a witness against himself, by force of any compulsion used towards him to procure his testimony in the other case, which testimony cannot possibly be used in the criminal case against himself.

I conclude, therefore, that the relator was not protected by the constitution from answering before the grand jury.

A similar question has been before the former Court of Chancery and the late Court of Errors. By the usury act of 1837, it was made a criminal offence to take usurious interest, and, by a provision of the same act, a plaintiff, in an action at law, brought on a contract alleged to be usurious, might be examined by the defendant as a witness to prove the usury, and the alleged usurer was likewise obliged to answer a bill of discovery on oath; but it was provided that neither the testimony so given, nor the sworn answer of the defendant in Chancery, should be used against the party who had so testified or answered, either before the grand jury, or on the trial of an indictment: Ch. 480. In *Perine vs.*

Pixley, 7 Paige 598, the defendant had demurred to the plaintiff's bill, which was filed to enforce proceedings at law on a note alleged to be usurious, and which required a discovery of the usury by the defendant's oath. The Chancellor considered the statutory provision, that the answer should not be used against the party, before the grand jury or on the trial of an indictment against him, as an answer to the objection taken on the ground now under consideration; but the case was decided against the plaintiff on another ground. The case of *Henry vs. The Bank of Salina*, 5 Hill 523, *S. C.*, in the Supreme Court, Id. 555, approaches very near to a judgment of the court of errors upon the precise point. On the trial, the defendant had offered to call the real plaintiff to prove the usury, in an action at law, pursuant to the act of 1837; though the plaintiff on the record was another person who had no interest in the demand. The main question was whether one for whose benefit the action was brought, but who was not the plaintiff on the record, was within the scope of the statute. The Supreme Court held he was not; and hence, that not having the protection of the statute, he could not be compelled to prove himself guilty of a misdemeanor. The judgment, which was for the plaintiff, was reversed in the court of errors; where it was filed that a plaintiff in interest was within the statute, and that the Supreme Court had committed an error in not compelling the plaintiff to be sworn. Such a decision, of course, assumed that the statute requiring the plaintiff to be sworn, was constitutional on the ground that it afforded a sufficient protection to the plaintiff, who was thus compelled to be a witness. This would be entirely conclusive upon the point now under discussion, but for the fact first mentioned by the Chancellor, that the case did not disclose whether the usury, of which the defendant sought to avoid the note, had been actually taken, or only secured to be taken. If the latter was the case, he held that the usurer would not be indictable, as the section of the statute, creating the criminal offence, applied only to those who actually received the usurious premium. No protection would be required in such a case; at all events, the constitution would not stand in the way. But the learned Chancellor

added: "In the case now under consideration, I think the witness was compelled to testify, he being the real plaintiff, even if he had received a portion of the usurious premium so as to subject him to indictment under the act of 1837. And provided he was not the real plaintiff, but a mere witness, he was bound to testify if he had made a usurious contract merely, without having actually received the usurious premium." None of the other members of the court took particularly of the point now in question; but the case, if not a precise authority, shows at least considerable weight of judicial opinion in favor of the judgment of the Supreme Court in the present case.

My conclusion is that both the judgments appealed from ought to be affirmed.

The early authorities are opposed to the view, that the propriety of a commitment for contempt, can be examined on the return to a writ of habeas corpus. The course of reasoning was that an adjudication, that a contempt had been committed, is a conviction, and commitment in consequence an execution, and no court can discharge or release a person, that is in execution by judgment of any other court: *Brassby's Case*, 8 Wilson 183, 199. The principal opinion was delivered by Lord of Justice De Grey. This doctrine was adopted in *Ex parte Kearny*, 7 Mason 43, by the Supreme Court of the United States. The court held, as appellate power in criminal cases has been confided to it by the laws of the United States, and as it cannot reverse the judgments of the circuit court by writ of error, in any case where a person has been convicted of a public offence, that it would not indirectly reverse the decision by habeas corpus. If a prisoner had been convicted of a contempt, for refusing to answer a question which was put to him, because he answered it tended materially to implicate him and to criminate him as a

particeps criminis. The court did not take the distinction made in the principal case, but held, that as it could not reverse on a judgment obtained on an indictment revise it on habeas corpus, so it could not on a conviction for contempt, which was equivalent to a judgment. This case was followed in *Jordan vs. State*, 14 Texas 436. So in *Passmore Williamson's Case*, 26 Penn. (2 Casey) 9, it was held, that a judgment pronounced in the District Court of the United States against a person for contempt, in disobeying its process, is conclusive, and cannot be examined in a state court on habeas corpus. Said the court, "All courts have the power to punish for contempt and must necessarily have it. The authority to deal with an offender of this class, belongs exclusively to the court in which the offence is committed, and no other court, not even the highest, can interfere with its exercise, either by writ of error, mandamus, or habeas corpus. If the power be abused, there is no remedy but by impeachment. * * * If we fully believed the petitioner to be innocent, if we were sure that the court which convicted him, misunderstood the facts or misapplied

the law, still we could not re-examine the evidence or rejudge the justice of the case." This language is undoubtedly very strong, but the only point really decided in these cases was, that where there was no right of appeal under ordinary methods, the court or a judge on a habeas corpus, would not do indirectly what could not be done directly. The first case cited was a conviction by the House of Commons; the second, by a United States court without any appeal; the third, by a United States court, and the authority of a state court was invoked.

The principle on which these decisions are based, does not appear to embrace such cases as that of *People vs. Kelly*. A direct method of review in the Supreme Court, is provided by the legislation of New York, of all judgments of the court of general sessions based upon an indictment, and if there could have been no review of a conviction for a contempt, a defect of justice would have existed. The Supreme Court of Pennsylvania have recently explained *Passmore Williamson's Case*, *supra*, and have confined its effect to the class of cases above indicated: *Commonwealth vs. Newton*, 1 Grant's Cases (Penn.) 458, (1857). It was there held, that the course of proceedings by which a superior state tribunal reviewed the decisions of an inferior state court, was not analogous to that, where an attempt was made to review the decision of a United States court in a state court. In that case, the conviction for contempt was reviewed on an appeal as the result of a proper construction of a state statute. It would seem in accordance with principle in all such cases, as that discussed in *Commonwealth vs. Newton*, and in *People vs. Kelly*, that the propriety of a conviction for contempt should be subject to review on habeas corpus, when no other distinct method is provided.

See *Ex parte Rowe*, 7 Cal. 175, also Mr. Holroyd's argument in the case of *Burdett vs. Abbott*, 14 East 69, 70, apparently approved by Lord ELLENBOROUGH in the same case, p. 150.

However this may be, even if we assume that the principle of *Brass Crosby's Case* should be applied to both classes of cases, where adjudications for contempt have been made, it should be extended only to those instances where the commitment is for contempt *generally*. If the ground on which the adjudication was made, *appeared upon the face of the return*, and this was palpably bad, the prisoner ought to be discharged. By parity of reasoning, the court on habeas corpus should have a right to examine the return, to ascertain if it were wholly insufficient. In the strong language of Lord ELLENBOROUGH, "if a commitment appeared to be for a contempt *generally*, I would neither in the case of the House of Commons or of any other of the superior courts inquire further; but if it did not profess to commit for a contempt, but for some matter appearing on the return, which could by no reasonable intendment be considered as a contempt of the court committing, but a ground of commitment palpably and evidently arbitrary, unjust and contrary to every principle of positive law or national justice, we must look and act upon it as justice may require, from whatever court it may profess to have proceeded." And again, "if the judges before whom those applications (*Brass Crosby's, &c.*) were made, on writs of habeas corpus, had felt, that the Houses had no pretence of power to commit, or had seen upon the face of the returns that they had exercised it in those cases *extravagantly and beyond all bounds of reason and law*, would they not have been wanting in their duty if they had not looked into the causes of com-

mitment stated?" *Burdett v. Abbott*, 14 East 150-1

In the case of *Ex parte Rowe*, 7 California R. 175, 181, 184, (1857,) the same point was presented as in the principal case. A witness had refused to testify because an answer to the question asked would tend to criminate him, and had been convicted of a contempt. It was held on habeas corpus, that the rule in *Brass Crosby's Case* extends only to lawful orders, and, if the prisoner was protected by a constitutional provision he ought to be discharged: see *Burnham v. Morrissey*, 14 Gray (Mass.) 226, where the Supreme Court of Massachusetts would appear to be of the same opinion, in the case of a commitment by the House of Representatives. The power of the House in that state is to a certain extent regulated by the constitution, but the court did not proceed upon that ground. *Morrissey* was the sergeant-at-

arms of the House, and an action had been brought against him by *Burnham* for false imprisonment. He justified under his warrant from the speaker. The court inquired into the grounds on which the commitment rested, as they would have done if an application had been made for a discharge on *habeas corpus*. See also *Hurd on Habeas Corpus* 411-18, and authorities cited.

II. The principal question discussed in this case, involving the proper construction of the constitutional provision, that a person shall not be compelled in any criminal case to be a witness against himself, was presented to the Supreme Court of California in *Ex parte Rowe*, 7 Cal. 181, 184, (1857,) and the same conclusion in substance was reached. The witness in that case also, had been protected by statute against the use of his testimony on his own trial.

T. W. D.

Supreme Court of Missouri.

WILHELMINE REICHARD, Respondent, vs. THE MANHATTAN LIFE INSURANCE COMPANY, Appellant.

- . As a general rule, the party holding the affirmative of the issues has the right to open and conclude the argument to the jury; but such practice being within the discretion of the court, the refusal to give the defendant the conclusion will be no cause for reversal of the judgment.
- . An agreement in a policy of insurance, executed by a foreign insurance company, that the insured waives the right to bring an action upon the policy except in the courts of the state incorporating such company, is void, both as against public policy and the statute of this state relating to foreign insurance companies of December 8, 1855; R. C., p. 884.
- . Where, in a policy of insurance upon life, the representation was ~~made~~ that the insured was sober and temperate and in good health; if the representation was true at the time it was made, the subsequent habits of the insured would be no bar to a recovery upon the policy.

APPEAL from St. Louis Circuit Court. Suit upon a life policy of insurance made by the defendant, a company chartered by the state of New York, and dated July 1, 1856, upon an application dated June 16, 1856. To the question, "Is the party sober and temperate?" the applicant answered, "Yes." Q. "What is the present state of health of the party?" Ans. "Very good." Q. "Does the applicant know that any misstatement would render the policy void?" Ans. "Yes."

The application had the following provision: "I hereby expressly waive all right to bring any action for any claim whatever arising under any policy issued to me on this application and declaration except in the courts of New York."

The policy having been forfeited by non-payment of the premium, was renewed July 16, 1857.

The instructions appear in the opinion. The verdict was for the plaintiff.

Knox and Kellogg, for appellant.

1. The appellant insists that the respondent, before the issuing of the policy sued on, waived all right to sue except in the courts of the state of New York, and that the Court erred in refusing the instruction asked to that effect.

2. The Court erred in refusing to instruct the jury, that if Reichard's death was occasioned by the intemperate and excessive use of intoxicating drinks, the plaintiff was not entitled to recover.

Hart and McGibbon, for respondent.

1. The instructions asked by defendant and refused, point to no period of the life of the insured, and cover his whole lifetime. The instructions given by the Court present to the jury the question, as to the truth of the declarations made by the insured in the application, and at the revival of the policy.

2. The material question was whether the assured was sober and temperate at the time the risk was to take effect, or was revived. The jury found that issue for the plaintiff; and the instructions given covering that point, it was not error to refuse to repeat them: *Williams vs. Van Meter*, 8 Mo. 339; *Pond vs. Wyman*, 15

Mo. 175; *Carrol vs. Paul*, 19 Mo. 102; *Hurst vs. Robison*, 8 Mo. 82; *Huntsman vs. Rutherford*, 13 Mo. 465; *Gamache vs. Piquinot*, 17 Mo. 310; *Young vs. White*, 18 Mo. 93.

3. The waiver of the right to sue in any other Court than those of the state of New York was void, as against public policy: Story on Cont. 449; Chitty on Cont. 674.

BAY, J., delivered the opinion of the Court.

This was an action to recover the sum of two thousand dollars, with interest, insured by defendant upon the lives of Frederick Reichard and Wilhelmine his wife, for the sole use of the survivor. The policy bears date July 1st, 1856, and required that the premium should be paid annually on or before the 26th of June in every year, otherwise said policy to cease and terminate. The policy became forfeited by the non-payment of the premium, but was renewed on the 16th of July, 1857. Frederick Reichard died January 27, 1858. It is provided in the policy, and declared to be the true intent and meaning thereof, that if the declaration made by the said Frederick and Wilhelmine, bearing date the 16th and 18th days of June, 1856, and upon the faith of which the agreement was made, shall be found in any respect untrue, then and in such case said policy shall become null and void. In the statement referred to, the insured represented that they were sober and temperate, and in good health. It was also stipulated between the parties, that the insured waives all right to bring an action under said policy except in the courts of the state of New York.

The answer of defendant denies the right of plaintiff to sue in the courts of Missouri. It sets up as a further defence, that said Frederick Reichard was not a sober and temperate man when said policy was issued and when the same was revived, nor was he in good health when said policy was revived.

Upon the trial below, defendant's counsel claimed the right to open and conclude, upon the ground that the answer set up affirmative matter to defeat the action; and the refusal of the Court to so permit him is assigned here as error. There can be no doubt but that the general practice in this country is to permit the party holding the affirmative, and upon whom rests the burden of proof,

to open and conclude the argument to the jury, but it is a mere matter of practice resting in the discretion of the Court; and this Court has held, in *Wade vs. Scott*, 7 Mo. 509, and in *Tibeau vs. Tibeau*, 22 Mo. 77, that it will not reverse a judgment upon that ground, unless it is manifest that such refusal has produced a wrong to the party. In this case, we are not advised that the defendant suffered any injury by the ruling of the Court in that respect.

The next error is that the Court refused to instruct the jury, that if they found from the evidence, that, when application was made for the policy of insurance, the applicants waived all right to bring any action for any claim whatever arising under said policy except in the courts of the state of New York, then the plaintiff cannot recover.

We think the Court very properly refused this instruction, not only upon the ground that the agreement to waive the right to sue in our courts is void, as against public policy, but because it is in direct contravention of a statute of this state passed for the government and regulation of agencies of foreign insurance companies, approved December 8, 1855. The first section of the act requires that every person acting as an agent of an insurance company not incorporated by the laws of this state, shall, before entering upon his duties, perform certain acts, among which is the following:—

“He shall file with the clerk of the county court of the county in which he proposes to do business, a resolution of the board of directors of such company, duly authenticated by the secretary thereof, under seal of such company, authorizing any person having a claim against such company, growing out of a contract of insurance in this state with the agent or agents thereof, doing business in this state, to sue such company for the same in any court of this state having competent jurisdiction; and further authorizing the service of process on said agent or agents, by personal service, or by leaving a copy thereof at his last place of abode, to be binding on said company to abide the issue of said suit, and that such service shall authorize a judgment in such suit against said

company in the same manner and with like effect as a judgment is taken against an individual in such court when having full jurisdiction over him."

The object of this enactment is very apparent. Prior to its passage our courts had no control over these foreign companies, who felt licensed to defraud our citizens out of their just dues whenever they felt so disposed. In many instances the owners of property insured submitted to ruinous compromises rather than undergo the vexation, expense, and uncertainty of litigating with a powerful corporation in the courts of a distant state. The legislature, therefore, very wisely determined that they should not do business in this state unless under certain restrictions imposed for the public good. The right of claiming to sue in our courts is one of the concessions made by these companies for the privilege of being permitted to establish agencies here. The agreement of the parties then, in this case, is not only to divest our courts of their jurisdiction, but to relieve the defendant of an obligation, not imposed by the insured, but by a law of the state. We are clearly of opinion that such an agreement is null and void.

The last ground of error is the refusal of the Court to give certain instructions asked for by defendant. The Court, at the instance of defendant, gave the following instructions:—

"If the jury find from the evidence that the said Frederick Reichard was not sober and temperate when the policy sued on was issued, they will find for the defendant.

"If the jury find that Frederick Reichard was not of sober and temperate habits on the 16th day of July, 1857, when said policy was renewed, they will find for the defendant.

"If the jury find from the evidence that, at the time the policy sued on was renewed, the said Frederick Reichard was of intemperate habits, and that this fact was not communicated by the assured to the defendant, then the plaintiff cannot recover.

"If the jury find from the evidence, either that the said Frederick Reichard was not, at the time of issuing the policy, a temperate man, or was not a sober and temperate man when the policy sued on was renewed, the jury will find for the defendant, unless

they further find that said defendant had notice that said Reichard's habits were not sober and temperate at these times.

"If the jury find from the evidence that said Reichard was not in good health on the 16th of July, 1857, when the policy sued on was revived, then the plaintiff cannot recover in this case."

The defendant then asked the Court to give the following instructions, which were refused:—

"If the jury find from the evidence that Frederick Reichard's death was occasioned by the intemperate use of intoxicating drinks, then the plaintiff cannot recover.

"If the jury find from the evidence that Frederick Reichard's death was hastened by the intemperate use of intoxicating drinks, the plaintiff cannot recover.

"If the jury find from the evidence that Frederick Reichard died in consequence of the excessive use of intoxicating drinks, then the plaintiff cannot recover."

The instructions refused do not, in our opinion, embody the law of the case. They refer to no definite period of time. It is immaterial whether Reichard's death was occasioned by intemperance or not. If he was, at the time of the issuing of the policy and at the time of the renewal thereof, temperate and in good health, then it cannot be said that he made false representations to the company, without which the risk would not have been taken. The risk was taken upon the statement made at the time of issuing the policy, and had no reference to any future change in the habits of the insured. If Reichard became intemperate subsequent to the issuing and renewal of the policy, and this fact could be set up in bar to a recovery, we see no reason why intemperance in eating, the undue exposure of the person to the inclemency of the weather, or any other act tending to shorten life, might not with equal propriety be pleaded in bar.

The instructions given left it to the jury to say whether, at the time of the issuing and renewal of the policy, Reichard was in good health and of sober and temperate habits. It was a question of fact, and the jury having passed upon it, we see no reason to disturb their verdict.

The other judges concurring, the judgment is affirmed.

District Court for the City and County of Philadelphia.

SHOENBERGER vs. WATTS.

Defendants executed a bond with warrant of attorney, for \$28,000, payable "in specie, current gold and silver money of the United States," and "that no existing law or laws, and no law or laws which may be hereafter enacted, shall operate, or be construed as operating to allow payment to be made in any other money, than that above designated;" "the said obligors expressly waiving the benefit derived or to be derived from such law or laws."

Judgment was entered and *fi. fa.* issued, in which the sheriff was required to levy the debt and interest "in specie, current gold and silver money." The Court, on motion, set aside the *fi. fa.* and *held*: That the *fi. fa.* was irregular; as a *final judgment* is necessarily for *lawful* money, and is payable in any money which the law has made a legal tender

The facts of the case will appear in the opinion of the Court, which was delivered by

HARE, J.—The defendants in this case, Henry Musselman and Henry M. Watts, executed some years ago a bond to the plaintiff, conditioned for the payment of twenty-eight thousand dollars, not as such instruments are usually worded, in lawful money, or lawful money of the United States, but "in specie, current gold and silver money of the United States."

This peculiarity in the wording of the condition, which was, when written, mere tautology or surplusage, as being a needless expression of that which the law would have implied if it had not been expressly stipulated, has since acquired significance, and become a stipulation for that which the law no longer implies, and perhaps will not enforce or sanction. For, by the passage of a recent and well known Act of Congress, Treasury notes of the United States have been raised to an equality as money with gold and silver, and declared to be a legal tender for the payment of all debts. The constitutionality and binding force of this act are not denied by the plaintiff, who has expressly waived bringing them in question, but he insists that it is not applicable to a contract, which, like the present, provides expressly, that the payment shall be made in gold or silver, and thus impliedly negatives the right to pay in paper. He has accordingly entered

judgment on the warrant of attorney accompanying the bond and reciting its condition, and issued an execution by which the sheriff is required to levy twenty-eight thousand one hundred and fifteen dollars out of the goods and chattels, lands and tenements of the defendants, not as such writs ordinarily run, in lawful money of Pennsylvania, but "in specie, current gold and silver money," in the words of the condition of the bond. This writ the defendants ask to set aside as without warrant, unusual and illegal; and we have consequently to determine first, whether the special agreement on which the plaintiff relies is legal, and one for which the law will give a remedy; and next, if it be so, whether the summary remedy which the plaintiff has chosen has been chosen rightly, and is well founded in point of law.

The familiar maxim, *quilibet potest renunciare juri pro se introducto*, implies what we know from other sources, that men are in general free to contract as they think proper, and may, ordinarily speaking, make any bargain, which suits their pleasure, the law not caring, and indeed not being able to ascertain whether what has been agreed on between persons who are *sui juris*, and not destitute of ordinary capacity, is wise or foolish, beneficial to both, or advantageous to neither of the contracting parties. When, however, a contract is contrary to law, and attempts to do or regulate in one way, that which the legislature has declared shall be done in another, the law may, and often will pronounce the contract void, especially if the matter be one in which the whole community has an interest, and which does not exclusively concern the individuals who have made the contract. A debtor may renounce the protection of the statute of limitations after it has taken effect in his favor, and barred the debt, but he cannot do so in the first place in making the contract in which the debt originates. No covenant, in or at the time of executing a mortgage, can be so binding as to preclude the mortgagor from redeeming the mortgaged premises, or even limit the time within which the right may be exercised, although his control over it is for all other purposes absolute, and he may, if he pleases, cede it to a stranger for nothing. Examples might be multiplied, but

these are sufficient to show the necessity for drawing the line between what may and what may not be renounced lawfully, and the difficulty of drawing it correctly. There is nothing in which the public at large have a greater interest than in the currency, which is to the social system what the circulation of the blood is in the natural body, which brings to the laborer the reward of toil, to the merchant the returns of commerce, to the agriculturist facilities for exchanging his productions, which is literally and without overstatement, the means of luxury, of comfort and of daily bread to each and all in their several stations. It feeds and supplies the community in peace, it arms and maintains the soldier, who is the defence of the state in war; it is next to light and air, and beyond all secondary and artificial agents, the most general, the most pervading and powerful influence, and that on which most depends. Its uniformity, its stability, its security, and still more, the confidence felt in its security, are in their turn the springs on which it rests, and by which alone it can perform its vast and delicate functions. Hence, the power of saying what shall be money, at what rate money shall be taken, and what it shall be worth, has, in all civilized countries, and almost from the outset of civilization, been deemed one of the badges and attributes of sovereignty, and assigned to the central and supreme authority of the state, as that which may indeed be perverted or abused, but which, yet abused or not, must be exercised uniformly, and according to some common rule, in order to be of utility at all. This being the object and design for which the coining and money-making power was given to the government of the United States in common with all other governments, we may well doubt whether, when that government has exercised its high prerogative, by deciding that certain modes or forms of value shall all be money, and all be money equally, that the same nominal quantities of each shall be worth as much as any of the others, it can be competent for the citizen to discriminate in a matter where the law of the land has refused to distinguish, to make a bargain including those with whom he contracts from a means of payment which the law has decided shall be open to, and available for all.

and incumber them with a debt of a new and special nature, incapable of being discharged in the way in which ordinary debts are by law payable. Congress, in the exercise of its supreme authority, declares that gold, silver and Treasury notes shall be legal tender for the payment of all debts, that a debtor who comes with these, or any of them in his hand, and proffers them to his creditor, shall be freed from all further obligation, that all liability on his part either in person or property shall forthwith cease. Not so, says the creditor; by the magic of a few words in this paper, I will create a debt and impose an obligation, to which the enabling and beneficial provisions of the statute shall not be applicable, which gold, which silver or which government paper shall not be capable of extinguishing, which must be paid in a particular way of my own choosing, that will, as I think, be more beneficial to me, whatever may be its effect in depriving my debtor of the right of choice given him by Congress. Surely, this is to run counter, not only to the spirit, but to the very letter of an act which applies in terms to all debts, without excepting any, or in any way providing or implying that there may or can be a right to create debts to which it shall not apply.

These considerations certainly have much weight, and may well induce a doubt, whether a contract, by which a debt must be paid only in one form or mode to the exclusion of others, which, in the eye of law, are of equal validity, and in which it has declared, that all debts shall be payable, is consistent with public policy, or legally good and valid. But there is another line of argument tending nearly, if not directly to the same result, and which may be regarded as a corroboration of that pursued above. If an agreement for payment in gold and not in silver, or in silver and not in gold or Treasury notes, be legally binding, it is still but an agreement, which will not be specifically enforced if broken, or admit of any other remedy than an award of damages as compensation for the breach. If, for instance, the stipulation is for gold, and silver only is tendered, or for silver and the tender be in paper, the compensation due, the damages adjudged, will depend on the difference between what was due and what was offered, or

between gold and silver in the one case, and gold and paper in the other. But by the Constitution of the United States, Congress has power "to coin money and regulate the value thereof," and has exercised that power by declaring, that a hundred pieces of silver of a certain weight and fineness shall be of the same value as a hundred pieces of gold of a certain other weight and fineness, or in other words, that a hundred dollars shall be worth a hundred dollars and no more, whether tendered in silver or in gold. Whenever, therefore, it shall become the province of a court and jury to ascertain the compensation due to a man who has bargained for gold and had silver offered to him, or has bargained for silver and been met with a tender of gold, it will probably be the duty of the court to instruct the jury that there is no damage, or that the damage is but nominal; that what was offered under the contract was legally equivalent to that which the contract called for; that the party plaintiff is not, in contemplation of law, injured, and is simply entitled to a verdict for the amount of the debt without costs or interest. It is true, that a visit to a board of brokers or other place of business, where coin is bought and sold as merchandise, might lead to a different result, and show at one time, that a hundred dollars in silver is far from having the same value as a hundred dollars in gold, and at another, that a hundred dollars in gold is less valuable than a hundred dollars in silver. But there are many cases in which the legal measure of damages is different from the real, and where the law falls short of compensation for the full amount of the injury for reasons which need not be detailed here, but which would recommend themselves to all if there were time to state them. This is especially true where money is in question, and where the wrong consists in the breach of an agreement for the payment of money, distinguished from one for the delivery of things of any other description. A merchant's credit and fortune may have been ruined, the most favorable opportunity for speculation may have been lost, the most profitable bargain or enterprise abandoned in consequence of the impunctuality of a debtor, and yet the creditor will be confined to a recovery of the debt with six per cent. interest

during the time that payment has been delayed, and proof that the compensation thus given is insufficient and falls far short of the real loss, rejected as wholly immaterial in point of law. Even, therefore, if a stipulation that what the law declares a legal tender shall **not** be so, or that a debt shall be payable in one kind of legal currency to the exclusion of others, is not to be set aside summarily as contrary to public policy, it must still, as it would seem, fail of effect, when brought to the test of an attempt to enforce it by a suit for damages.

I am, however, reminded by counsel, that the bond on which the plaintiff seeks to recover in this instance, besides stipulating for payment in gold and silver money of the United States, also stipulates "that no existing law or laws, and no law or laws which may be hereafter enacted, shall operate, or be construed as operating to allow payment to be made in any other money, than that above designated;" "the said obligors expressly waiving the benefit derived, or to be derived from such law or laws;" and these clauses are said to be at all events binding, and to entitle the plaintiff to insist on the terms of the bond, whatever might have been the rule if they had not been introduced. But, with every disposition to give weight to this argument, which was carefully considered by the Court in consultation, I am unable to see that it varies the case, or renders anything that has been said hitherto inapplicable. If the subject-matter of this contract is such that it may be dealt with freely at the pleasure of the parties, irrespectively of the words of the statute, then their express agreement that the bond should be paid "in specie," should have that effect given to it which they must be presumed to have intended, and the debt be treated as one which gold and silver can alone satisfy. But if, on the other hand, as I have endeavored to show, and think most probable, the matter is one which the law reserves exclusively for its own action, and will not suffer to be touched by any private or inferior hand, then a stipulation that it shall not be regulated by the law, must, necessarily, be void and inoperative. It is obvious that parties cannot nullify the provisions of a statute, by anticipation, on any point where they

would necessarily be bound by them, if the statute had been passed; and that the question whether a contract is contrary to law, is to be solved by looking at the law and the contract, and seeing whether the one contravenes or is opposed to the letter and spirit of the other, and not merely by considering whether the law was made before the contract, or the contract before the law. The State Legislatures are, indeed, by the Constitution of the United States, prohibited from impairing the obligations of contracts, but there is no such restraint on the National Legislature, and when the power of Congress is exercised retrospectively as it ordinarily is, and in the nature of things generally must be in legislating with reference to the currency, and declaring what shall be money and what money shall be worth, it will apply as effectually to past debts as to those which are subsequently contracted, notwithstanding anything which may be said to the contrary in the agreement in which the debt has its origin.

It is, however, unnecessary to express a final opinion on these points, which concern the plaintiff's right under the contract, because it is clear that even if he has the right which he claims, he has mistaken the remedy, and must resort to a longer and less direct path than that which he is endeavoring to pursue. If a bond were conditioned for the payment of a certain number of bushels of wheat, or for a specific amount of foreign coin, every one would admit that the entry of judgment on a warrant of attorney accompanying the bond, would not justify the issuing of an execution addressed to the sheriff, and commanding him to sell the goods and chattels of the defendants for, and payable only in the wheat or coin which he had promised to give, and which he was in default for not giving, because the proper redress would lie in a *scire facias* or other proceeding on the judgment, of a nature to bring the injury inflicted by the breach before a court and jury, and enable them to ascertain its exact nature, and what amount of damages should be awarded by way of compensation. And it would seem very plain that the same course must be pursued when the condition is for the payment of a particular sort of domestic currency, to the exclusion of every other. If the breach of a con

dition to pay in gold and not in silver, or in silver and not in treasury notes, be an injury in the sense in which injury implies a violation of legal right, as distinguished from the infliction of loss or damage without legal wrong, still the amount of the injury is obviously a question of fact depending on the state of the market for bullion when the default occurs, and requiring the introduction of evidence on one side or on both, for its proper adjustment. Like other questions of the same sort, it should therefore be tried by a jury, and solved by their verdict, guided by the charge of a court. But the plaintiff, instead of pursuing this course, has entered a judgment on the bond, which he has treated as final, and not interlocutory, by proceeding at once to execution. Now, a final judgment in debt, covenant, or assumpsit, or indeed in any proceeding instituted for the recovery of money or damages, is necessarily a judgment for so much lawful money, payable in any money which the law esteems lawful, and has made a legal tender when other payments are in question. Whatever the contract may have been, when once pushed to a recovery it can have but one termination, and end in a judgment, not for what was contracted for, but for an equivalent for the breach of the contract in current coin. There may, indeed, sometimes in replevin or detinue, be a recovery of a specific thing, but never in actions founded on contract, nor in any action for things generally of a specific kind or class; the reason being that every judgment must be final, and furnish an exact measure of what one party is to give and the other to get.

Equity may, no doubt, make a decree, and issue a writ to compel the performance of a contract, specifically and in terms; but then the jurisdiction of equity is discretionary and special, controlled by circumstances, and exercised with reference not only to the strict legal right of the plaintiff, but to what the defendant may in each instance be reasonably required to do, and has it in his power to accomplish. And besides, equity confines this sort of redress ordinarily, if not exclusively, to contracts for the conveyance of land, and will seldom, if ever, compel the fulfilment of an agreement for the sale and delivery of chattels. The writ

which has been issued in this instance, is in effect a decree of specific performance, requiring the defendants to fulfil their contract to the letter, and directing the sheriff, in the event of their default, to fulfil it for them, by converting their lands and goods not into money generally, but into the particular kind of money which they contracted to furnish. Such an order seems to me essentially contrary to the spirit in which equity proceeds in enforcing contracts, and would be as little likely to receive the sanction of a chancellor, as of the judges of a Court of common law.

It has, however, been suggested, that although the plaintiff could not, on a bond or covenant for payment in Spanish dollars, with a warrant of attorney, enter judgment and issue execution for Spanish dollars, there is no reason why he should not have a judgment and execution for silver American dollars, as distinguished from gold, or payable only in gold dollars, and not in paper. One, and to a legal mind, sufficient answer to this is, that such a judgment would be without a parallel or precedent, and contrary alike to the forms and spirit of the law, which always seeks to pass from the particular to the general, and may well be adverse to giving force and perpetuity to a special obligation, that may, in the course of time and events, become difficult to execute, if not of impossible execution. The ordinary, wise, and invariable course therefore is, and has been, to refer the injury inflicted by a breach of contract, to the period when the contract was broken, to examine what the injured party would have got, if the contract had been then fulfilled, and what he lost by its non-fulfilment, to estimate this in the currency of the commonwealth, and enter judgment for the amount as thus ascertained; a judgment not in the terms of the contract, while it drowns or merges, and having nothing in common with it, except that of being an equivalent in the general and common measure of all value, for the particular form of value stipulated for in the contract. A contract may be for the delivery of grain, but the judgment on it is not on that account for grain, but for as much money as the grain, if delivered, would have been worth at the time and place of delivery. A judg

ment on a contract for doubloons would follow the same rule, and be not for doubloons, but for the value which the doubloons would have had if delivered according to the contract. Why should a contract for gold dollars receive a different or more favorable construction, and entitle the party who seeks to enforce it to an anomalous judgment, not for compensation, but for the things, or rather for the class of things contracted for? Judgments should be so shaped and moulded that the benefit to one party may be attained with the least amount of injury to the other, and this is what the law has done by rendering them for currency generally, and leaving the defendant free to choose that sort of current money which can be obtained with the least difficulty; but a judgment and execution solely for gold, or exclusively for silver, might impose a burden on the defendant which he ought not to be compelled to bear, and lead to the sacrifice of his property without any corresponding advantage to the plaintiff. And as the present writ of *fieri facias* sins against these principles, and departs from the even tenor which every judgment should pursue, by limiting the sheriff to one particular kind of currency, instead of leaving the defendant free to pay, and purchasers under the writ free to buy in all, it is set aside in accordance with the prayer of the defendants.

Rule absolute.

STROUD, J., dissented.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF PENNSYLVANIA.¹

Contract to pay the Debt of Another, when valid.—A firm sold out their partnership effects to another, who agreed verbally to pay the firm debts. One of the firm creditors sued the purchaser for his debt, relying on the contract of sale, without showing that he was a party to it. *Held*, that he could not recover, for the agreement upon which the action was brought was not in writing and signed by the party to be charged therewith, as required by the Act 26th April, 1855. *Shoemaker vs. King*.

¹ From Robert E. Wright, Esq., State Reporter, to be reported in the 4th volume of his Reports.

Though such a contract is valid between the immediate parties to it, it is void as a contract in favor of the creditors of the parties, unless they, as a part of the arrangement, give up their original claims and accept the new contract instead. Without this it is void, when *expressly* made to the creditors, and therefore it cannot be *implied* as made to them. While the old debt remains, the new contract cannot be a substituted, but is only collateral one—a promise to pay another's debt, which is forbidden by the statute, as a cause of action. *Id.*

Act of May 6th, 1844, relative to "Lapsed Legacies," construed.—Distribution per stirpes and per capita.—Construction of Will.—Under section 2d of Act 6th May, 1844, a bequest by a testator to his sister is valid, though she was dead when the will was written, but left children who survived the testator: *Minter's Appeal*.

Where the testator directed his bequests to be distributed, "share and share alike among the children of my brother Adam, and the children of my brother Martin, and to my sister Barbara," who died before him leaving children; but by another clause in the will, the mode of distribution was rendered doubtful; it was *held*, that the legal statutory form of distribution should be applied, and that the legatees should be classified in three classes, allowing each class to take as their parents would have done, *per stirpes*: *Id.*

Distribution of Personal Estate of Decedent as between first and second cousins.—Under the Act of 27th April, 1855, the children of deceased uncles and aunts take by representation, such part of the estate of a decedent as the parents would be entitled to if living. The rule of distribution is *per stirpes* and not *per capita*: *Brenneman's Appeal*.

That act constituted the grandchildren of brothers and sisters, and the children of uncles and aunts, additional classes of collateral heirs, as distinguished from next of kin, and they, therefore, take as such, when entitled to inherit, and not as next of kin as under the Act of 1833: *Id.* The second cousins of the decedent are not entitled to a distribution under the act: whenever they are entitled to inherit, it must be as next of kin, and their distribution is *per capita*: *Id.*

Liability of Stockholder for Debts of Manufacturing Corporation.—Order of Defendants.—Defence to the Action.—The Act of April 20th, 1853, supplementary to the Act of April 7th, 1849, entitled an "Act to encourage Manufacturing Operations in this Commonwealth," renders the

stockholders in all companies incorporated in pursuance of its provisions or under the act of 1849 and its supplements, liable for all debts contracted while they are stockholders, although they have paid up the whole of their stock: *Patterson & Co. vs. The Wyomissing Manufacturing Company et al.*

Though the corporation is the principal debtor, and the liability of the stockholders is only secondary and collateral, yet the form of the remedy and the character of the right, under the Acts of Assembly, allow the use of separate actions against the primary and secondary debtors: *Id.*

In an action against stockholders, brought to enforce such liability, the plaintiff may join the corporation, even though he has previously obtained a judgment against it, for a portion of the debt sued for: *Id.*

It is not a good plea in bar to an action against the stockholders, that the corporation had not paid the bonus of one-half per cent. on the amount of the original capital stock, as required by the state: the *proviso* to the Act of April 20th, 1853, is not properly a proviso, but an additional law: *Id.*

*Resolutions of City Councils of Harrisburg, not valid unless approved by Mayor and recorded.—Regulations, Resolutions, and Ordinances, defined and distinguished.—*A resolution of the city councils, which is to be executed and carried into effect by the mayor, must be presented to him for his approval and be recorded, in order to be valid: *Kepner vs. The Commonwealth.*

Where by one section of the act incorporating the city, it was provided that the council may make "by-laws, ordinances, resolutions, and regulations," and by another, that "by-laws and ordinances" were to be submitted to the mayor for his approval, it was *held*, that there was no such distinction between the sections, as would require that "by laws and ordinances" should, and "regulations and resolutions" should not be submitted to the mayor, to be approved by him: *Id.*

*Personal Liability of Grantee not implied from mention of Encumbrance in habendum of Deed sealed only by Grantor.—Covenant, interpreted by intention of Parties.—Remedy to recover Money charged on Land during Life of Widow.—Devisee of Land subject to Widow's Thirds take cum onere.—*One bought land subject to the payment of the dower of a widow charged upon it in the hands of the grantor, but the grantee did not sign nor seal the deed, in the *habendum* of which, the charge of the dower was expressed: he devised the land to his daughter by his will.

and after his death, and when the dower had become payable by the death of the widow, an action of debt was brought against his executors for the dower, by those entitled thereto. *Held*, that the words in the *habendum* of the deed to the testator, did not in themselves import a covenant or promise by the acceptance of it, to be personally answerable to discharge the dower: *Shoenberger's Executors vs. Hay et al.*

The true rule for the interpretation of covenants, is so to expound them as to give effect to the actual intent of the parties, as collected from the whole instrument; though the result may be, that words *per se*, implying personal obligation, will be denied the effect of a covenant or a personal promise to pay, without regard to the enjoyment of the property: *Id.*

That the devisee of the testator took the estate subject to the dower: *Id.*

Liability of Married Woman for Purchase-money of Real Estate.—Bond and Mortgage of, when valid.—Waiver of Twelve Months' Delay in issuing scire facias.—A married woman bought land, received the deed and gave bond and mortgage, all in her own name alone, for the balance of the purchase-money, to be paid at the death of two annuitants, to whom the interest was to be paid annually during life. By condition in the bond, the principal could "be collected as if fully due," on default for six months in paying the interest. *Held*, that upon such default, the principal could be collected by suit upon the mortgage: *Glass vs. Warwick.*

Though in strict law a married woman has no power to make such contracts, except when joined with her husband, yet, in order to prevent great injustice, they will be enforced in equity, and according to the necessities of common justice, rather than to the terms of the contract: *Id.*

Surety on Bond of Assignee for Creditors, Liability of.—What Acts of Creditor will relieve Surety.—The mere omission of a creditor to sue the principal debtor, does not discharge a surety; but where the creditor has the means of satisfaction, either actually or potentially, in his hands, and does not retain it, the surety is discharged: *Richards vs. The Commonwealth.*

A. became surety for an assignee B., into whose hands a distribution of the estate of his assignor C. came for a creditor D., who died before the account was finally settled; afterwards, B. himself made an assignment for the benefit of his creditors, who were paid in full and a surplus returned to the assignor. The administrator of the creditor D. in

neither instance presented his claim for payment, but afterwards, brought suit against the surety A., for the distribution to which he was entitled, under the original assignment of C. to B. : *Held*, that he was entitled to recover, notwithstanding his inactivity and neglect in presenting his claim; that the creditor had not the possession, actual or potential, of the means of satisfaction; that mere forbearance would not discharge the surety, who under the law had the means, by notice to the creditor, to compel him to collect the claim against the principal debtor, and that unless the surety had given such notice, lapse of time, in itself, would be no defence: *Id*.

Parol Evidence of Contents of Lost Records, when admissible.—Decree of Divorce not to be reversed Collaterally.—Evidence of Fraud not admissible, if Collusive.—Divorce, when a Bar to Dower.—Evidence of the contents of lost portions of the record is admissible after existence and loss have been proved: Miltimore vs. Miltimore and De Bourbon.

A wife obtained a decree of divorce A. V. M. from her husband, on the ground of adultery, having herself procured the issuing of the subpoena, but twelve days before the ensuing term. After more than seven years, on the death of her husband, she endeavored to avoid the decree on the ground of irregularity, and demanded dower in her husband's estate. *Held*, that she was estopped by her own acts, and that the decree of the court having jurisdiction both of the cause of action, and the parties, was not void but only voidable if taken in time by a party who had a right to object: *Id*.

Evidence is not admissible on the part of the demandant, that there was fraud in obtaining the decree, in that the application for divorce was collusive. *Nemo allegans suam turpitudinem*, etc. The principle of estoppel applies, though, without reference to the decree of divorce, she could make out a *prima facie* case for dower: *Id*.

It was not error in the court to charge the jury, that there having been a decree of divorce from the bonds of matrimony, which remained unreversed and unappealed from, the demandant was not entitled to dower in the real estate of the decedent: *Id*.

Forfeiture of Charter not to be tried Collaterally.—Equitable Estoppel.—On the trial of an action of assumpsit by plaintiffs, who were owners of a turnpike road, against a defendant for tolls due for the use of the road, a plea involving a forfeiture or invalidity of the charter is demurrable, or may be treated as a nullity by the court. The violation of a charter of

incorporation, cannot be made the subject of a judicial investigation in a collateral suit: *Dyer & Co. vs. Walker & Howard*.

Where the defendants had used the road, and had contracted to pay for such use, there being no other claimants for the tolls, they are in equity estopped from setting up defects in the plaintiff's title, or the charter if there were any; and they are liable to pay for the use of the road, if not prevented from using it, by the defects alleged: *Id.*

SUPREME COURT OF MASSACHUSETTS.¹

Deposition—Officer—Arrest—Escape.—No exception lies to the decision of a judge of the superior court upon the question whether a deposition which has been read in evidence in a trial shall be delivered to the jury when they retire to consider of their verdict: *Whithead vs. Keyes*.

In an action against a sheriff for an escape suffered by his deputy, the return of a rescue upon the writ is not conclusive evidence in favor of the defendant: *Id.*

An officer is not bound to call for aid in the service of mesne process, and is not liable for an escape that might have been prevented by his calling for aid: *Id.*

An officer is bound to use all reasonable and proper personal exertions to secure a person for whose arrest he has a writ; and if, in the opinion of the jury, he has not done so, he may be held liable for an escape, although he used all such exertions as he deemed necessary at the time: *Id.*

An officer effects an arrest by laying his hand upon a person whom he has authority to arrest, for the purpose of arresting him, although he may not succeed in stopping or holding him: *Id.*

Composition with Creditors—Fraudulent Agreement.—If a voluntary assignment for the benefit of creditors has been executed by a debtor, upon the delivery to him of a release from his debts, a creditor who, by a secret agreement not to claim any portion of the proceeds of the estate, induced the assignee, who was also a creditor, to sign the release and to procure the signatures of other creditors thereto, cannot maintain an action against the assignee to recover the dividend upon his debt: *Frost vs. Gage*.

¹ From Charles Allen, Esq., State Reporter; to be published in the forthcoming volume of his reports.

Way.—No action lies to recover damages for the obstruction of a highway, against a city which is bound to keep it in repair, by an individual whose place of business thereby becomes more difficult to reach, his business injured, the delivery of articles which he has sold and the gathering in of his crops more expensive, his houses less desirable for tenants, and his rents diminished in value, if other persons suffer damages from the same cause, similar in kind, though less in degree: *Willard vs. City of Cambridge*.

Conversion.—One who receives goods into his possession and control knowing that they were not lawfully in the possession of the person who brought them to him, and afterwards allows them to be taken away by the same person, is not thereby guilty of a conversion: *Loring vs. Mulcahy*.

Divorce; Fraud.—This court has power, under Gen. Sts. c. 107, § 4, to declare a marriage void, into which a man was induced to enter by confiding in representations of the woman whom he took for his wife that she was chaste, when in fact she was with child by another man, if her husband repudiated her as soon as he had reason to know the fact: *Reynolds vs. Reynolds*.

Bailment—Negligence.—The hirer of a horse who, by improperly feeding and watering him, has made him sick, and returns him in this condition to the owner, is liable for his full value, if the owner, by the use of reasonable care and the employment of a suitable veterinary surgeon, who treats him according to his best judgment, is unable to cure him; although such treatment was in fact improper, and contributed to the horse's death: *Eastman vs. Sanborn*.

Puuper.—One who, being in need of immediate relief and support, has received the same from the town of his lawful settlement, is not, in the absence of fraud, liable to an action by the town therefor, although he was possessed of property at the time: *Inhabitants of Stow vs. Sargeant*.

Fraud—Foreclosure of Mortgage.—An action to foreclose a mortgage which has not been discharged, but has been delivered up to the mortgagor, together with the note which it was given to secure, may be maintained, by proving to the satisfaction of the jury that the note has never in fact been paid, and that such delivery of the note and mortgage was procured through the fraud of the mortgagor, in falsely representing that another worthless note and mortgage of real estate, delivered to and

accepted by the mortgagee in exchange therefor, were good and sufficient: *Grimes vs. Kimball*.

Insolvent Debtors.—A promissory note is not provable in insolvency against the estate of an indorser, before its maturity: *Stowell vs. Richardson*.

Foreclosure of Mortgage by Second Mortgagee—Executors.—A second mortgagee of land may maintain an action to foreclose his mortgage against the first mortgagee, who is in possession for the purpose of foreclosure, if the latter is also the owner of the equity of redemption; and under his execution may be put temporarily in possession, without an actual ouster of the first mortgagee: *Cronin vs. Hazletine*.

(One of two executors may assign a mortgage given to his testator: *Note*.)

Fraud.—The purchaser of a note and a mortgage given as security therefor, who had an opportunity to examine the property described in the mortgage, cannot maintain an action of tort against the seller for falsely and fraudulently representing to him that the security of the mortgage was undoubted, and the property conveyed was of great value over and above all encumbrances, and amply worth the amount of the note, and could be sold for its face at any time: *Veasey vs. Doton*.

SUPREME COURT OF NEW YORK.¹

Inland Lakes—Riparian Proprietors—Land under Water—Obstruction of View.—An inland lake, five miles long and three-fourths of a mile wide, having no current and no main inlet, is not, in any legal or just sense of the term, navigable water: *Ledyard vs. Ten Eyck*.

Where the State issued a patent, embracing a portion of such a lake within its boundaries, the northern line crossing the lake, but there was no restriction or exception of the lake, no reference made to it, and no reservation of the water or the land under the water, it was *held*, that the grant carried the southern portion of the lake to the grantee, absolutely: *Id.*

Where lands are bounded, in a deed of conveyance, by a lake of that description and the outlet thereof, the title of the grantee extends *usque ad medium filum aquæ*. At all events, the deed will carry the right to land subsequently filled in, where the water is shallow, immediately in front of the grantee's premises: *Id.*

¹ From the Hon. O. L. Barbour, Reporter of the Court.

Where the State has sold and conveyed land bounded by a *navigable* lake or river, it holds the title to the land under water in front of the premises as *trustee* for the *public*, in order to protect navigation and prevent hindrances or obstructions. At the same time the State declares itself trustee for the *riparian proprietor*, and provides that grants shall be made to him alone, and that they will be made not only for purposes of commerce, but wherever proper for the beneficial enjoyment of his adjacent lands: *Id.*

Where the public authorities proceed to deepen the outlet of a lake, and deposit the earth and stones that are removed in the shallow water in front of and adjacent to premises previously conveyed to another, it is a visible and public declaration that that portion of the lake can no longer be used for navigation; and the grantee will enter into possession, and the trusteeship of the State, both for the public and the riparian proprietor, is virtually at an end: *Id.*

No action will lie against such riparian proprietor, in favor of an adjoining owner, to restrain the planting of trees upon such newly acquired land, and thereby obstructing the plaintiff's view of the lake: *Id.*

Title to Land occupied by a Turnpike Road—Deeds bounding Lands by a Highway—Possession sufficient to maintain Trespass or Ejectment.—Where the language of a statute, incorporating a turnpike company, is such as to vest the title to the land over which the road passes in the company, it must nevertheless be considered as vested only for the purposes of the road; and when the road is abandoned the land reverts to the original owners: *Dunham vs. Williams.*

Where premises conveyed by deed were bounded easterly by a road or public highway, without any words indicating an intention to limit the eastern boundary to the westerly line of the road: *Held*, that the words of the grant included, by fair interpretation, the one-half of the road bed: *Id.*

And where the grantees and those claiming under them, had been in the actual possession of the lands adjoining the road, under such a deed of conveyance, subject to the public easement of the highway, for more than seventy years, it was *held* that they were in the constructive if not the actual possession of the western half of the road bed, sufficiently to enable them to maintain trespass or ejectment: *Id.*

Religious Societies ; Actions by Trustees.—Where the right of persons claiming to be trustees of a religious society, to the office of trustee, is disputed and denied, and they have not yet been admitted to the exercise of any of its rights or duties, and they are not and have not been in possession of the church edifice, nor of any of the temporalities of the church, they cannot maintain an action in the name of the religious society, to restrain individuals in possession and claiming to be the trustees of the society, duly elected, from closing the church edifice and preventing the pastor from holding religious meetings therein, &c.: *North Baptist Church vs. Parker et al.*

Before they can institute or maintain such an action, the plaintiffs must have been peaceably admitted to the office of trustees of the society, or have established their title thereto by a direct proceeding or action, brought for that purpose, by the attorney-general: *Id.*

The court will not, upon motion, decide who are the rightful trustees of the society, or determine the question of right to the office: *Id.*

Statutes—Taxation and Assessment.—If the State has the power to levy and collect a tax or assessment, to be paid to a railroad company as a compensation for the relinquishment of certain rights, it has the power to direct the transfer of the assessment, collectively, to the same company, for the same purpose, before its payment: *People ex rel. Crowell et al. vs. Lawrence et al.*

When the legislature determines that a public improvement will be a benefit to the adjacent property, and that the expenses of making the same shall be paid by the owners of such adjacent property, the courts have nothing to do with the correctness or incorrectness of the determination, but must assume the fact to be as the legislature assumes or declares it: *Id.*

The wisdom or justice of the taxation is not a subject of judicial inquiry; nor is the purpose for which the tax is to be imposed: *Id.*

The legislature is not confined, in such taxation, to existing political or civil districts; but may create a district for the purpose of taxation or assessment; and may impose the tax equally or *pro rata* upon all the property in the district thus formed *pro re nata*, or upon a rule of estimated benefit to different owners or individuals; and the proceeds of the assessment may be applied to some public or quasi public purpose or to compensation to, or the redress of, individuals: *Id.*

Lien of Vendor.—Whenever a vendor has manifested an intention not to rely on his lien upon the lands sold for the purchase-money, he will be considered as having waived it: *Coit vs. Fougere.*

So if a vendor, for a portion of the purchase-money, agrees to take a conveyance of other property, and a deed of such property is accordingly executed by the vendee, and delivered in escrow, the lien of the vendor will be gone. If the depositary refuses to deliver the deed, the remedy of the vendor is upon the agreement of sale between him and the purchaser to compel the delivery of the deed: *Id.*

Carriers of Passengers—Liability for Negligence of Others.—In the case of travel by passengers upon an ordinary highway in a public conveyance—especially where the highway is a crowded city street—the possibility of negligence or misconduct of the owners or drivers of other vehicles, over whom the carrier has no control, is a risk which a passenger cannot cast upon the carrier, but must, so far as the latter is concerned, take upon himself: *Spooner vs. Brooklyn City Railroad Company.*

Hence, if a passenger in a vehicle upon a city street voluntarily assumes a position which is not intended and ordinarily used for the conveyance of passengers, and which is exposed to danger from the misconduct of others, he himself contributes to an injury which he sustains by a collision produced by the wilful or the negligent acts of a third party, without any fault of the carrier; and he cannot recover against the latter: *Id.*

Purchasers at Judicial Sales—Memorandum.—The remedy against a purchaser who refuses to complete a purchase under a decree or judgment of a court of equity, is by an application to the court to compel him to complete it, or to resell the property, and hold him liable for the loss and the additional expenses: *Miller vs. Collyer.*

A paper signed by an individual, on becoming a purchaser of property at a sheriff's sale under a judgment, by which he agrees to comply with the conditions of sale, is not a contract either with the sheriff or the plaintiff in the foreclosure suit, upon which an action can be maintained by the latter, as the assignee of the sheriff: *Id.*

Such an instrument, in the form of a memorandum at the foot of the conditions of sale, signed by the purchaser, is merely a submission by him to the jurisdiction of the court, in the foreclosure suit, as a purchaser under the judgment therein: *Id.*

It seems, that conditions of sale by a sheriff on execution, imposing upon the purchaser a liability to pay the amount of any deficiency in case of a resale, will not apply to any case except that of a resale made forthwith, upon failure of the purchaser to pay the required per centage of his purchase: *Id.*

NOTICES OF NEW BOOKS.

THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES. By JOHN CODMAN HURD, Counsellor at Law. Vol. 1. 1858. pp. xlviii. & 617. Vol. 2. pp. xlv. & 800. 1862. Boston: Little, Brown & Co.

The first volume of Mr. Hurd's work has been for several years before the public; the second has been published during the present year. It purports to be strictly a law book, and to discuss the principles of jurisprudence applicable to the subject of freedom and bondage in the United States.

The author lays a broad foundation for his special topic by an examination of certain general principles which underlie it. His work may be regarded as divided into three parts: the first is elementary or abstract; the second, historical; the third, practical. In the elementary portion, the primary and secondary meanings of the term *law* are stated, and jurisprudence is defined as the science of a rule identified with the will of a state. After distinguishing between international and municipal law, each is divided into public and private. Private municipal law determines the relations of individuals towards each other; public municipal law consists in the definition and assertion of the nature, bounds and purposes of the supreme power in any given state; private international law determines the relations of individuals towards national jurisdictions other than that to which they are primarily subject; and public international law determines the mutual relations of sovereign states, as such.

The method in which law is generated is then touched upon, and shown to be the same both in municipal and in international law. So far as it is applied by judicial tribunals, international law is to be distinguished from municipal law only by the nature of the relations which it affects; they are identified in respect to their authority over all persons within the jurisdiction of the state.

There has grown up by the assertion and acknowledgment which all states or nations have made of principles of natural reason a *universal jurisprudence*—a law of nations (*jus gentium*) as distinguished from a law between nations (*inter gentes*). These two divisions of international law have been changing and extending their principles during the time of recorded history, according to altered views of natural equity. The inquiry at any particular time is purely historical. *Universal jurisprudence* cannot be spoken of abstractly as being a fixed system of law, or one which

a thinker would elaborate by a process of reasoning *a priori*. The question is, what did the nations, as a matter of fact, recognise as principles at any given period in the world's history? In other words, the honest inquirer into "universal jurisprudence" would adopt the same *method* as the student of the common law of England. He would seek to ascertain from standard authorities what principles were admitted by the nations at the time to which he directed his investigations.

The great maxims of private international law are next stated and expounded, and application made to the subject of personal condition, or *status*. In the absence of all positive legislation, the condition of persons once domiciled in a country different from the one where the question of *status* arises, would presumptively be determined by the "universal jurisprudence" already described. Still any state may, if it see fit, disallow the principles of universal jurisprudence. This part of the work is closed by an inquiry into the legal duty of a nation which does not recognise chattel slavery, to enforce within its jurisdiction, by means of its judicial tribunals, relations of this kind existing in a foreign country.

In this elementary part of Mr. Hurd's book clear distinctions are made, and accurate and exhaustive definitions given. The first chapter, by its learned and elaborate foot-notes, furnishes ample means to the legal inquirer for a satisfactory and independent examination of every topic embraced within it.

The *second* part of the book, commencing with the third chapter and closing with the eleventh, contains an historical examination of the law of *status*, or personal condition. After examining how far the English law of *status* was in legal view applicable to the American colonies before the Revolution, Mr. Hurd discusses the principles of universal jurisprudence relating to freedom and its contraries, entering into and forming a part of the common law of England. In taking this view, he examines chattel slavery under the Roman law, the modifying effect of Christianity upon it, and the extent to which "universal jurisprudence" at and before the period in question sanctioned the slavery of negroes and Indians. The recognition by England of these universal principles is then noticed, and the decisions of her courts examined and criticised, including the judgment of Lord MANSFIELD, in Somerset's Case. It having been previously shown that universal jurisprudence is based upon the general recognition by the nations of certain legal principles, and is in a continual state of transition, it is claimed as the result of an extended historical investiga-

tion, that when the United States government was formed chattel slavery was not generally recognised, but rested upon local law.

The principles thus obtained are then applied to an examination of jurisprudence during the colonial period of the United States. The doctrine is advanced that though the colonists claimed the rules of the English common law regarding personal rights as applicable to themselves, yet that these did not extend to persons coming from other countries. As to them, the doctrines of universal jurisprudence were applicable. Especially, the *status* of the negro or Indian, where no imperial legislation existed, was regulated either by the customary local law of the colony or by positive local legislation. An extended statement of the legislation of the colonies is then made, setting forth each statute and its date, with full references to original authorities. This digest of statutes occupies nearly one hundred pages, and is of great historical value. We know of no other work where so perfect and accurate a statement of the early statutes upon this topic can be found. This branch of the subject is concluded by an examination of the principles of private international law, existing for the several parts of the British empire during the colonial period, and relating to freedom and bondage.

In the third and practical part of the work the law of freedom and bondage in the United States is considered both with reference to the public law of the United States and the laws of the several states.

The second volume opens with an examination of the legislation of the several states, &c., since the Revolution. These are divided into three classes: *first*, the original thirteen states; *second*, those states which were formed from territories ceded to the general government by members of the first class; *third*, states and territories obtained by the general government through treaties and by conquest. This elaborate historical statement occupies more than two hundred pages, and is replete with interest and instruction. With the exception of a chapter upon the conditions under which private international law may exist between the several states embraced within the United States, the residue of the volume is devoted to a discussion of the first and second sections of the fourth article of the United States Constitution. The collation of authorities is extensive and thorough, and the author's own discussion and analysis searching and acute.

We give a hearty welcome to Mr. Hurd's able book. It will undoubtedly be recognised as a standard authority. Did our space permit, we

would gladly give some extracts from it as showing its method, and the breadth and fulness of its research. It is the only successful attempt to treat the law of "freedom and bondage" from a juristical point of view. Upon questions which border so closely upon the domain of politics, there will naturally be divergences of opinion. All enlightened and impartial members of the profession will cheerfully award to the author the merit of having made, for the first time, an exhaustive and systematic collection of authorities, and of having discussed a question in regard to which much loose declamation has existed, with the calm and impartial tone of a logician and a jurist. Mr. Hurd's first volume attracted favorable notice in foreign legal periodicals.¹ It may be safely predicted that the second volume will not fall behind the reputation of its predecessor.

T. W. D.

CIRCULAR AND CATALOGUE OF THE LAW SCHOOL OF THE UNIVERSITY OF ALBANY,
for the year 1861-2. Albany: J. Munsell, 78 State Street. 1862.

The law school at Albany, from the great advantages which it offers to students, is acquiring a growing popularity. The list of undergraduates for the current year is nigh a hundred, which, in times such as the present, is doing extremely well. There can be no doubt that the elements of law are best taught as a science, by lectures and systematic instruction. The old plan of studying in a lawyer's office, had some advantages, by combining theory directly with practice. But it produced inevitably a desultory mode of reading, and, except with very superior minds, tended to develop only case lawyers, whose learning had to be got up *pro re nata*. A judicious blending of the two methods, during the course of the student's probationary term, will give, no doubt, the highest results.

It is needless to say that the standing of the faculty of the Albany school is of the first class. The name of Chancellor Walworth, the President of the Faculty, is, in itself, a tower of strength. The plans of instruction appear to be very judicious and well arranged. Stress is properly laid in the circular on the advantages conferred by the moot courts, and the practice of requiring written opinions or judgments from students on the questions therein discussed. Finally, in the well chosen law library of the school, and particularly in the remarkable one of the state, auxiliaries to instruction exist, which are not elsewhere surpassed.

¹ See London Law Magazine and Review. Vol. 8, p. 81. (1859-60.)

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HORIZONTAL DIVISIONS OF LAND.

Mr. Justice Blackstone defines an "estate" in land to be "such interest as the tenant hath therein." 2 Bl. 108.

It is an interest in *land*. There can be no "estate" in purely personal property. When we speak of personal *estate*, we do not use the word in the sense in which it has become technical in the law of realty.

This term *land* includes not only the surface of the ground, but the substance or body of the soil, *usque ad mediam terræ*, and all appurtenances to the soil, with the water and open space or air over it, *usque ad cælum*.

If a man, therefore, have a circular surface, the actual form of the land of which he is proprietor is a cone, of which the centre of the earth is the apex, and the circular surface of the earth, or a circular plane at an undefined distance above it, is the base.

Except under local statutory regulations, or by force of laws or customs, such as those which in some states prevent aliens or corporations from owning more than a certain amount of real estate, there seems to be no limit to the quantity of land which a citizen

may possess, nor to the extent to which, when he becomes the owner, he may divide and subdivide, for purposes of sale.

An estate in a square foot of ground is clothed with all the technical characteristics of an estate in a hundred acres:

Prima facie when a man owns the surface he owns all accessions to it, such as trees, houses and other structures, and his proprietorship extends *usque ad mediam terræ* and *usque ad cælum*. If a man buy land at sheriff's sale or otherwise, by the description of a lot, bounded by certain lines, without mentioning buildings or any other thing, structures of any number and value, and mines of any depth, will pass to him by mere operation of law as incidents or appurtenances to his lot.

But this is only the result of a *prima facies* or presumption, not of any legal impossibility of severing the house from the land, or one story of it from another, or mines from the surface. Just as there may be different owners of different cones, there may be different owners of different *strata* of the same cone. Different proprietorships of land may be bounded or defined by horizontal as well as perpendicular lines. But such departures from the ordinary rule or custom of ownership require clear expression.

And first, as to the space or column of air over a man's soil. Is it his close, or is his ownership of it peculiar?

There is no doubt that if one owner erects or constructs something on his own soil, which overhangs his neighbor, he is liable in an action. This shows the right of the proprietor of the soil. But there has been a question as to the form of his action; and the discussion to which this question has led shows that distinctions must be made between his technical relation to the soil and the air.

If one man invades another's soil, trespass *vi et armis* is the remedy. The surface of the ground is a tenement, something corporeal, the possession of which will admit of that action.

It appears, however, to have been held that for overhanging another's land, the action must be on the case. In *Pickering vs. Reed*, Lord ELLENBOROUGH said: "I do not think it is a trespass to interfere with the column of air superincumbent on the

lose. I once had occasion to rule upon the circuit that a man who from the outside of a field discharged a gun into it, so as that he shot must have struck the soil, was guilty of breaking and entering it. A very learned judge who went the circuit with me, at first doubted the decision, but I believe he afterwards approved of it, and that it met with the general concurrence of those to whom it was mentioned. But I am by no means prepared to say that firing across a field *in vacuo*, no part of the contents touching it, amounts to a *clausum fregit*. Nay, if this board overhanging the plaintiff's garden be a trespass, it would follow that an aeronaut is liable to an action of trespass *quare clausum fregit*, at the suit of the occupier of every field over which his balloon passes in the course of his voyage. Whether the action may be maintained cannot depend upon the length of time for which the superincumbent air is invaded. If any damage arises from the object which overhangs the close, the remedy is by an action on the case." 4 Camp. 219.

It would seem from these remarks that, notwithstanding the axiom to which reference has been made, the position of this space or column of air is peculiar; and we know of no case in which an effort has been made by grant or conveyance to sever it from the soil and give an exclusive right in it, in the manner in which, as we shall presently show, the herbage or mineral strata may be severed from the body of the ground.

An exclusive right of fishery, also, in the water which rests on or flows over a man's soil is a peculiar right, and some of the views which apply to the air apply to the water. In *Hart Hill*, it was held that where there was a direct interruption of a fishery, who had an exclusive right of fishery, while actually fishing, trespass would lie, but the court seemed to think case the ordinary remedy for interruption of a fishery. 1 Whart. 124.

Where, however, one has an exclusive right to an oyster-bed, it would seem that trespass will lie though there be a common or free fishery over it.

In *Fleet vs. Hageman*, 14 Wend. 42, (see also *Decker vs. Fisher*,

4 Barb. 592,) this doctrine was distinctly laid down, but was not supported, as we think it might well have been, by the citation of cases to some of which we shall presently refer, and which, by analogy, would seem to establish that such a right is a freehold,—a tenement. Perhaps, however, owing to the mode in which the right arose, the question of the character of the interest may be considered as not having been fully presented.

We now come to the artificial structures upon or accessions to the soil.

In the Touchstone we are told that livery may be made of a "chamber," p. 214; and Mr. Burton says, "So an upper chamber may constitute a distinct tenement." § 549. In Erskine's Institutes of the Laws of Scotland, mention is made of rules which become applicable "When a house is divided into different floors or stories, each floor belonging to a different owner, which frequently happens in the city of Edinburgh." Book II. tit. 9, § 11. Similar authorities are to be found scattered through the books; and we know of no reason why they are not applicable in this country. It is true, land is more valuable, houses are more lofty, and cities cover smaller areas, in proportion to their respective populations, where these peculiar ownerships occur, than they do in this country; but as our population increases we may adopt the same habit.

It is manifest that if one person may own a distinct story or chamber, there may be one owner of the land and another of the whole house upon it, as well as of any part of the house.

These authorities apply to houses and other artificial accessions to the land. We now proceed to those which refer to the different portions of the soil itself.

Mr. Burton says: "It may also be collected from the authorities that, by special grant, the vesture or herbage of land may constitute an interest distinct from the body of the subjacent earth, and yet capable of being defended by action of trespass and recovered in ejectment; though it may be thought uncertain whether such an interest lies in livery." § 1162. And Lord

Coke, after declaring that a rent cannot issue out of an incorporeal, says, "But if a man demiseth the herbage or vesture of his land, he may reserve a rent, for that the thing is maynorable, and the lessor may distrain the cattle on the land." 47 a.

Some of the cases upon this subject are very curious indeed, and are deserving of special reference. They suggest difficulties which surround the well established division of hereditaments into corporeal and incorporeal, and might lead us to reconsider it, if it were safe to do so. The truth is, that many of the technical terms and arrangements of legal science have become fixed and hardened in imperfect stages of its development. But they are now too firm and obstinate to be disturbed. To readjust them would make endless confusion with students, and controversy with those who will admit nothing against the oracles of the law. It is one of the many difficulties under which legal science labors, that we must carry its history as well as its reason along with us, and when the latter rebels, often coerce it into an awkward submission to the former.

At common law that was corporeal of which livery could be made, and actual seisin had, and in respect of which trespass and ejectment were the tenant's remedies. That of which livery could not be made was said to lie in grant, and was called incorporeal. When one had an estate in the land he was said to have a corporeal hereditament; when his estate was in a common or an easement upon or out of land, he was said to have an incorporeal hereditament.

In *The King vs. The Inhabitants of All Saints*, a pauper whose settlement was in controversy, had been allowed to take the sand and gravel from the bed of a river exclusively, on certain terms. His settlement depended on the question whether this right was a "tenement" or not. The court held that it was. 5 M. & S. 90.

Lord Coke says, "So if a man grant to another to dig turves in his land, and to carry them at his will and pleasure, the land shall not passe, because but part of the profit is given, for trees, mines, &c., shall not passe; but if a man seised of lands in fee, by his deed granteth to another the profit of those lands to have and to hold to him and his heirs, and maketh the livery *secundum formam*

doni, the whole land itself doth passe; for what is the land but the profits thereof: for thereby vesture, herbage, trees, mines and all whatsoever parcel of that land doth passe." And Mr. Burton says, "A grant of the profits of land carries the land itself." § 547.

And Lord Coke further says, "By the grant of a boillourie of salt it is said that the soil shall passe, for it is the whole profit of the soil." See also *Earl of Bute vs. Grindall*, 2 H. Bl. 265.

It was upon this ground that the court, in the case of the pauper, appear to have decided that his right amounted to a tenement. He had exclusively in him the only profit of the bed of the river; the only use to which it could be applied.

In *The King vs. Tolpuddle*, which was also a settlement case, the pauper had rented twenty cows at so much per annum, and agreed that they should pasture in certain fields for certain parts of the year, exclusively. Lord Kenyon held that he had a tenement, because he took by the mouths of his cattle the entire profits of the soil, exclusively. ASHHURST, J., says, "During that time, therefore, the pauper had a separate pernancy of the profits of these fields, which is equal to a demise of the land itself." 4 T. R. 675.

The case of *Burt vs. Moore* was a similar one, except that the person, the character of whose right was in question, had the exclusive right of pasture at all times. 5 T. R. 332.

The same decision was made in the case of a warren, where the person had an exclusive right to take the herbage by the mouths of rabbits, and where there was a lease of the fishery of a pond, "with the spear, sedge, flags and rushes growing in and about the same."

In these cases it was impliedly held, if not expressed, that the right to the herbage carried with it the right to so much of the soil as was necessary to support the herbage, and this of course added to the dignity of the right.

In *Stanley vs. White*, it seems to have been held that a grant of an exclusive right to trees which were growing, and were to

continue to grow, passed the soil necessary for their support. 14 East 842.

These cases seem to have been decided in favor of the dignity of the estate of the person who had this paramount or entire use of the profits of the soil, on the ground of its being exclusive. This exclusiveness was not, of course, considered relatively to other persons who might well have been joint owners with him of this right, without changing its character, but relatively to the owner of the fee in the body of the land. If the right had been held in common with him, it would, no doubt, have been held to have been an incorporeal hereditament, without reference to the paramount or absorbing character of the use.

And where this exclusiveness exists, it does not seem to matter whether it is caused by the express words of the grant or by some peculiar necessity of the use.

We ought, perhaps, not to pass to another topic without remarking that, at one time, it was made a question whether such *exclusive* rights could be granted; whether they must not necessarily and for the sake of congruity be in common with the owner of the body of the soil: 1 Williams' Saunders, 351 and notes. But this original difficulty seems not to have been long regarded. The result of abandoning it was the very perplexing class of cases already cited, or hereafter to be noticed.

Rights in the nature of *easements* may also be of the dignity of a tenement when they are not only exclusive, but paramount and engrossing.

In *Le Fevre vs. Le Fevre*, a right was given to the owner of one lot of land to lay pipes, for the purpose of drainage, through another's land, under a grant for that purpose. DUNCAN, J., says, "I own the inclination of my mind is that an interest in the soil at the given place passed, not only for laying the pipes, but for occupying and possessing exclusively the spot designated by the grant." 4 S. & R. 244. See *Jackson vs. Buel*, 9 Johns. 299; *Kearick vs. Kern*, 14 S. & R. 271.

It would seem as if, where a right of way is, by the express terms of the grant or by necessity, exclusive, and an absorbing

use of the land, it would amount to a tenement, and be corporeal. Thus, where a right of way is taken by a railroad, but its system of police, to prevent accident, requires the part taken to be fenced in, and persons and cattle, even the owner of the soil and his cattle, to be excluded, the interest would appear to be corporeal: *The King vs. Joliffe*, 2 T. R. 90; *The King vs. Bell*, 7 T. R. 598.

A burial lot, which the owner has an exclusive right to enclose, cultivate, and ornament with flowers, may well be considered as coming under the same head; and many other cases of exclusive rights, apparently of a commonable character, or in the nature of easements, might be mentioned as belonging to this class of interests.

But even this necessity of absolute *exclusiveness* has not been held, in all cases, to be requisite; or, at least, the exclusiveness need not continue throughout the year.

In *Ward vs. Petifer*, the vicar's choral, in Litchfield, had *primam tonsuram* of a meadow called the Parson's Hayn, from the haying until the crop was mowed and carried away, and never had other profit thereof; while it appeared Sir Edward Pite had all the profits thereof for the rest of the year. In an ejectment by the vicar's lessee, the court say, "that properly, unless other matter be shown to the contrary, the freehold is in him who hath the first tonsure; for that is the most beneficial part of the year; and those who have the after-pasture, have but the profits in nature of common; but admitting he hath but the first crop, yet they held he may well have an ejectment thereof:" Cro. Car. 162.

In accordance with this new phase in the development of the distinction between the corporeal and incorporeal, it was held in the case already cited, of *The King vs. Tolpuddle*, that the interest amounted to a tenement, and was corporeal, though the right to pasture the cows was only exclusive for part of the year; while in the case of *The King vs. Churchill*, a right, though exclusive, was considered too short, and relatively too insignificant to give the freehold: 4 B. & C. 750.

These cases establish, beyond a doubt, that there may be a freehold in the tonsure, pasturage, mowage or herbage of land, and that

this carries with it the right to enough of the soil to support it; that this right or interest is a tenement which is recovered and defended by actions of trespass and ejectment, but is still a freehold in the mere surface as distinguished from the body of the earth.

With these cases before us, we may be pardoned for another recurrence to the subject of the difficulties which they create in respect of the common law division into corporeal and incorporeal; and we shall, perhaps, be better understood after a few remarks upon what is called an "estate."¹

It is a word which is used in combination with others explaining or applying it, to express the extent of an owner's right to use and dispose of land. If we say a man has an estate for years, we indicate the length or, as it is called, the quantity of the estate. If we say he has an estate in an easement or common, we apply the word to its subject.

The words "estate for years" at once suggest certain doctrines to the instructed mind, and the words "estate in a common," certain other doctrines; but are these classes of doctrines so widely diverse as one would suppose?

The words "estate for years," when used with reference to the admitted corporeal, the land itself, not only express an interest which must terminate at a certain day, and which the tenant cannot control for a longer period, but they suggest further a limit to the modes of using and enjoying land. The physical control of the tenant for years over land differs almost as much from that of a tenant in fee, as the control of one who has a common of pasture differs from that of a tenant for years. The latter has most of the easements and commons of which the land is susceptible, and but little more. He cannot tear down or build;—he cannot open a mine or quarry;—his right to cut or lop trees is extremely limited;—his very modes of ploughing and disposing of

¹ We have already given one of Blackstone's definitions of this word. But he further says, "It is called in Latin *status*; it signifying the condition or circumstance in which the owner stands with regard to his property."

manure are watched by the reversioner or remainder-man, who has a most decided control over his movements.

And, showing how easily special restraints or regulations upon an ordinary tenancy may perplex our arrangements of subjects, Mr. Burton says, "It is seldom indeed that any doubt can arise as to the corporeal nature of those concurrent interests which several persons may have in the same land, as joint tenants, coparceners or tenants in common, except, perhaps, where an ancient tenancy in common has been subjected to some customary regulations as to the mode of enjoyment, similar to those usual in commons of pasture; which appears to be the case with what are called cattlegates in Yorkshire." § 1159.

May not such regulations be made by agreement in modern tenancies? Thus, if there be a conveyance of land to two joint tenants or tenants in common by a deed to which all are parties, and which not only secures the title to them, but defines their mode of using the land relatively to each other, very serious question might arise whether, under a conveyance of the soil to both, one had not obtained a mere incorporeal.

By using words of conveyance, therefore, which have no reference whatever to the creation of any incorporeal hereditament, the modes in which the tenant is to use the land may be as closely defined and as much restrained as if words were used specially directed to the creation of a common or an easement.

And to take another and perhaps more disturbing view: where words are used to indicate rights only of a commonable character or in the nature of easements, incorporeals are sometimes not created. The cases cited seem at least to establish these points. To give a man exclusive right of pasture for life in a meadow which is susceptible of no other use, is to give him a corporeal—a freehold in the herbage or tonsure; and he may have a joint tenant of the right without changing its nature. If one has such a right even for the larger or better portion of the year, it is a corporeal, even though the owner have the exclusive use the rest of the year. If one has the *primam tonsuram* exclusively, and commons with the owner all the rest of the year, the former has a freehold.

Land is not like a personal chattel, of which one can have actual exhausting enjoyment. He can wear out a coat, drink up wine, eat fruit, spend money, or take merchandise with him to a new locality. Not so with the land. The proprietor can neither consume it nor remove it. He may sell sand, or stone, or ore from off it; but, practically, the land remains. It cannot be destroyed; it cannot be brought into court; it cannot be delivered from hand to hand; it cannot be actually seized by the sheriff. It is the incorporeal interest in it alone which any man can have, or about which there can be contention; and this incorporeal has as many different aspects and modifications as the wit of man can devise. Some of these modifications are presumed, as from the quality or quantity of the estate, others are expressed; but they run in extent or degree from the amplest to the most restricted use, without allowing of any clear distinction, such as that based on the words corporeal and incorporeal.

We now descend below the surface, and treat of the strata which underlie it.

In *Comyn vs. Kyneto*, ejectment was brought for a coal mine. It was objected that it did not lie because the coal mine was *quoddam proficuum subtus solum*, and an *habere facias possessionem* could not be had thereof; but it was held to be well brought, because the coal mine was a profit of which the law took cognisance, and the case of the boylarry of salt and another case of a coal mine were cited: Cro. Jac. 150.

In *Wilson vs. Mackreth*, it was held, that an exclusive right of digging peat in certain mosses was to be defended by an action of trespass, *vi et armis*, and not by an action on the case: Burr. 1824.

In *Humphries vs. Brogden*, it was distinctly held, that there may be different freeholds and different inheritances, being different closes in different strata: 1 Eng. Law & Eq. 241. See also *Harris vs. Ryding*, 5 M. & W. 60; *Wilkinson vs. Proud*, 11 M. & W. 88; *Soughton vs. Lea*, 1 Taunt. 409; *Rich vs. Johnson*, 2 Strange 1142.

In *Caldwell vs. Copeland*, the court say, "The judge's language

was, 'the actual possession of the surface carries with it the actual possession downward, perpendicularly, through all the various strata. The actual possession, therefore, was in the plaintiff.' This proposition would be unquestionable, if there had not been a severance of the title to the mine right from that of the surface, by the deed of 27th May, 1831, Caldwell to Green. But it is not true that after such a severance, whether by reservation or grant, the possession of the surface is possession of the underlying mineral. That mines may form a distinct possession and a different inheritance from the surface land has been long settled in England." "It is a common occurrence in mining districts there, not only that the ownership of the soil is vested in one person and that of the mines in another, but there are frequently distinct owners of the minerals in the same land. Thus, one person may be entitled to the iron ore—another to the limestone—a third to one seam or stratum of coal, and a fourth to a distinct stratum. Title to any one of these minerals, quite distinct from the title to the surface, may be shown by documentary evidence; or, in the absence of such evidence, or in opposition to it, title to them may be made out by proof of possession, and acts of ownership, under the statute of limitations. The acts of ownership, however, which constitute possession and confer title, must be distinct from such as are exercised over the surface." "So entirely is a mineral right, after severance, a claim to land, and therefore not a corporeal hereditament, that title to it cannot be acquired by prescription." 37 Pa. Rep. 480; *Caldwell vs. Fulton*, 31 Pa. 482.

It may be asked, how thin these *strata* may be, and whether there may be a close or tenement in a single rock? We see no limit, in theory, to the possible subdivisions that may be made.

Of course, if an owner of a *stratum* of sand, clay, rock or ore digs it out and disposes of it, he makes it completely personalty, as any owner has a right to do with any part of his land. A house is realty,—an undoubted accession to the land,—but the owner has a right to take it down and sell its materials at his pleasure. The character of the house, as realty, is completely destroyed, but no

one uses this as an argument against the doctrine that the house, while attached to the land, was a part of it.

When such rights in different strata of the earth are created, the same difficulty arises as in reference to the herbage, in deciding whether a corporeal or incorporeal interest is created;—whether the proprietor has a mere common or an exclusive tenement.

As a very full and learned discussion of this question, in the light of cases ancient as well as modern, by a judge well able to discriminate, we refer to the decision in the case of *Caldwell vs. Fulton*, before cited. It would take more space than we can give in such an essay to consider it. It depends generally upon the terms of the grant in each case.

Of course, into the detailed doctrines of such a new sphere of law as that which concerns these horizontal sections, we enter with some uncertainty. It is but little developed by decision. The cases do scarcely more than suggest difficulties.

We have already seen that Mr. Burton expresses a doubt whether such an interest as that which results from having the exclusive right to the herbage, lies in livery. And in the case of *Wilkinson vs. Proud*, we find that the argument suggests such remarks from the bench as these: “PARKE, B.—It would be a matter of some difficulty to make livery of a stratum of coal lying under the soil. A communication might be made by digging down to it. ALDERSON, B.—Possibly a symbolical delivery on the surface of the land might be sufficient.”

And Mr. Burton says, “And with respect to mines, it is clear that they may be made the subject of ejectment, and of conveyance by livery, if actually opened; and that an interest in mines unopened may exist, independently of any estate in the surface of the land, which interest, until reduced into actual possession, so far resembles a remainder as not to be liable to dower; and for the same reason may, perhaps, be considered as lying in grant.” § 1164.

So in the case of *The King vs. Tolpuddle*, already cited, Lord KENYON says, “In order to make a tenement it is not necessary that the party should have the fee simple or the fee tail; any

minute interest in the land is parcel of a tenement. Such minute interest, indeed, cannot be entailed, but all the parcels, where consolidated together, may."

Another judge in the same case says, "that it could not have been entailed on account of the imbecility of the estate." If it had been a perpetual interest he seems to think it could have been entailed.

There is some confusion of expression here, and a possible doubt as to its application. The words "minute interest," used by Lord KENYON, appear to refer to the quantity of the estate, and not to the thinness of the surface; but all these doubts show the novelty and difficulty of the subject.

Some of these difficulties are not regarded in this country, where the tendency is to throw off the shackles of antique doctrine. In *Caldwell vs. Fulton*, the court say, "Our English ancestors, indeed, found difficulty in conceiving of a corporeal interest in an unopened mine, separate from the ownership of the surface, because livery of seisin was, in their minds, inseparable from a conveyance of land, and livery could not be made of an unopened mine. The consequence was that they were disposed to regard such rights as incorporeal, though they are not rights issuing out of land, but the substance itself. In this state, however, livery of seisin is supplied by the deed and its registration, and there is nothing incongruous in considering a grant of the substratum a grant of land, as much as is a conveyance of the surface itself. It is often by far the most valuable, and sometimes embraces all for which the land is worth owning."

Questions have arisen as to the relative rights and duties of these owners of houses, stories of houses, surfaces and strata above or below each other.

In Erskine's Institutes of the Law of Scotland, from which we have already cited, it is said, "the proprietor of the ground floor is bound merely by the nature and condition of his property, without any servitude, not only to bear the weight of the upper story, but to repair his own property that it may be capable of bearing that weight." "The proprietor of the ground story is obliged to

uphold it for the support of the upper, and the owner of the upper must uphold that as a roof or cover to the lower."

In *Humphries vs. Brogden*, already referred to, the court say, "We have attempted, without success, to obtain from the codes and jurists of other nations information and assistance respecting the rights and obligations of persons to whom sections of the soil, divided horizontally, belong, as separate properties. This penury, where the subject of servitudes is so copiously and discriminatingly treated, probably proceeds from the subdivision of the surface of the land and the minerals under it into separate holdings, being peculiar to England. Had such subdivision been known in countries under the jurisdiction of the Roman civil law, its incidental rights and duties must have been exactly defined, when we discover the rights of adjoining proprietors of lands to support from lateral pressure leading to such minute regulations," &c.

Since this case was decided, that of *Haines vs. Roberts* is reported, in which the duty of support, in such cases, is recognised as a general common law right. 6 El. & Bl. 643; S. C. 7 El. & Bl. 625.

, This necessity of supporting the surface or an upper mine is well understood and regarded among the miners in Pennsylvania. Perhaps many of the rules of lateral support might be found pertinent and applicable. But new and curious aspects of the question will, some day, have to be provided for. There must be some measure for the support which the lower proprietor must give, and of the weight which the owner of the surface may put upon it; and many other points of relative duty and protection must be settled. It is, perhaps, singular that so few decisions have been made on the subject in this country, many parts of which, like Pennsylvania, are so dependent upon mining interests. Most of the cases which now make their way into the digests come from the courts of California.

We hope to be able, at some future time, to pursue this subject further.

E. S. M.

UNSOLVED PROBLEMS OF THE LAW, AS EMBRACED IN MENTAL ALIENATION.¹

No. 2.

The greatest difficulties, and the largest number of unsolved problems, arise in the administration of criminal jurisprudence. The professions of medicine and of law have been tasked from the earliest periods to harmonize in the results at which they should arrive, and to establish such general principles as should be reasonable in themselves; and, while they should offer a shield to the really insane, should, at the same time, protect the community against the acts of criminals done under the guise of madness. The plea of insanity, it should be remembered, is one easily interposed; it is one that, if established by sufficient proofs, offers impunity to crime; one that admits the act charged as criminal to have been committed, and often boldly puts it forward as evidence of the very insanity which is claimed to exonerate from its commission; and one which sometimes a small amount of proof will render so plausible as seemingly to establish. Under

¹ Since the article in the preceding number was printed, the writer has been favored by Hon. HENRY E. DAVIES, one of the judges of the Court of Appeals, with a copy of his opinion, and the decision of the Court of Appeals in the *Parish Will Case*, in which many points of great interest are discussed and decided relative to the capacity to make a will. The case of *Stewart's Executor vs. Lispenard*, 26 Wend. 255, holding that a single advance above idiocy gives such capacity, is overruled, and the more wise and salutary doctrine established, that the testator must have sufficient capacity to comprehend perfectly the condition of his property, his relations to the persons who were, or should, or might have been the objects of his bounty, and the scope and bearing of the provisions of his will. That he must have sufficient *active memory* to collect in his mind, *without prompting*, the particulars or elements of the business to be transacted, and *to hold them in his mind* a sufficient length of time to perceive at least their obvious relations to each other, and be able to form *some rational judgment* in relation to them. Thus the result arrived at in this case, which has been so long vexing the courts, will be received with great satisfaction by the profession, who have generally regarded with disfavor the principle settled in the case of *Stewart vs. Lispenard*. The *Parish Will Case* will appear in the next volume of the *New York Reports*.

All these inducements to present it, it is not surprising that its appearance in court has been of late years quite frequent; so much so that it has been at times so unfashionable to plead it, that it has been received almost with derision. There are, however, reasons why it should have a fair hearing. The occurrence of insanity, in all its varieties and degrees, becomes more and more frequent as the means, processes, facts and results of civilization become increased and multiplied. Man in his primitive state is rarely ever insane. The Caucasian is about the only variety that can lay claim to this malady, and, even in that variety, it is very little prevalent in despotic governments. It is in those that are free, in which mind can come freely into conflict with mind, in which every chord of this curiously toned instrument is kept constantly strung, that every possible variety of mental derangement is of the most frequent occurrence. And thus, as new exigencies arise for mental action, new phases of mental alienation may appear, and hence, new series of phenomena may spring up, which cannot be brought within any rule, principle, or test already established. This must give rise to many unsolved problems in this department of the law.

It must be all along borne in mind that the act charged as criminal can only in the eye of the law become such, when it is done with a criminal intent. A failure to establish that, deprives it of that moral element which alone can constitute crime. Without that the act could only inflict an injury, but never a wrong. The blow of a maniac, although it might create an injury, yet could no more inflict a wrong than the kick of a horse or the fall of a stone. Very different is a blow dealt with all the fulness of attention. Then the act is punished as criminal, not only to render justice to the person injured and wronged, but also to exert a salutary effect in the prevention of the occurrence a second time of the same offence. This latter would be entirely lost in its effect upon the maniac. If really deranged he could no more be reformed by punishment than any one of the animal creation.

The question always presenting itself is, what is the kind and extent of mental alienation which can be legally interposed as a

defence to an indictment for a criminal offence? The answer to this question will bring to view the *different tests* which courts of law have proposed for the purpose of determining the validity of every plea setting up insanity as a defence. These tests, and the constructions which courts have placed upon them, become, therefore, important matters of inquiry.

The *first and oldest test*, and that in relation to which there is no controversy, is, "*when the defendant is incapable of distinguishing right from wrong in reference to the particular act.*" This may cover and exonerate two classes of mentally alienated: viz. the one whose alienation consists in preternatural defect, as being idiotic, imbecile, or demented; the other, all those afflicted with general mania. The application of this test has become widened as human experience has become more extended. In the *Trial of Arnold*, in 1723, 8 Hargrave's State Trials 322, Mr. Justice TRACY insisted that to be exonerated under this test, *a man must be totally deprived of his understanding and memory*, a limitation which, fortunately, the courts have not thought proper since to adhere to. A total privation is never now insisted upon. It is deemed sufficient if a privation exist in reference to the particular act. In the answer of the fifteen judges to the House of Lords, in 1843, in the case of *McNaughton*, 8 Scott N. R. 595, they say, "it must be clearly proved that at the time of committing the act, the party accused was laboring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong." The law as administered in England, to be consistent with itself, must refuse to partial insanity the effect of exoneration from crime. If that cannot legally affect man's civil relations, it cannot be expected to affect those which are criminal.

The *second test* is more recent, and may be stated to be "*when the defendant is acting under an insane delusion as to circumstances, which, if true, would relieve the act from responsibility, or where his reasoning powers are so depraved as to make the commission of the particular act the natural consequence of the delusion*"

This test was first introduced, and the legitimate effect of delusion in criminal jurisprudence first put forward and admitted in *The King vs. Hadfield*, 27 Howell's State Trials 1281. The speech of Lord Erskine upon that trial is a splendid specimen of juridical reasoning. The grounds taken by him and acquiesced in by the court were,

1. That it is the reason of man which makes him accountable for his actions, and that the deprivation of reason acquits him of crime.

2. That it is unnecessary that reason should be entirely subverted or driven from her seat, but that it is sufficient if distraction sit down upon it along with her, holds her trembling hand upon it, and frightens her from her propriety.

3. That the law will not measure the sizes of men's capacities, so as they be *compos mentis*.

4. That there is a difference between civil and criminal responsibility. That a man affected by insanity is responsible for his criminal acts where he is not for his civil.

5. That a total deprivation of memory and understanding is not required to constitute insanity.

6. That the individual is irresponsible where the insanity consists in hallucination; where the disease springs directly from the delusive sources of thought, and all their deductions, within the scope of the malady, are founded upon the immovable assumption of matters as realities, either without any foundation whatever, or so distorted and disfigured by fancy as to be nearly the same thing as their creation.

7. That the act complained of and sought to be avoided, must be the immediate unqualified offspring of the disease. Dean's Medical Jurisprudence 535-6.

The law in relation to the test of delusion has been more recently stated, with great caution, in one of the answers of the fifteen judges in the case of *McNaughton*, before referred to, to wit: "That their answer must depend on the nature of the delusion; but making the assumption that he labors under such partial delusion only, as is not in other respects insane, we think he must be considered in the same

situation as to responsibility, as if the facts with respect to which the delusion exists were real. For example; if, under the influence of his delusion, he supposes another man to be in the act of taking away his life, and he kills that man, as he supposes in self-defence, he would be exempt from punishment. If his delusion was, that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."

This statement is certainly characterized by extreme caution: but the question arises, whether it really covers the whole ground. Is it true that no other delusion except that embraced in the statement would afford a protection from an act otherwise criminal? The delusion under which Hadfield deliberately discharged his pistol at King George III., at Drury-Lane Theatre, intending to kill him, would not, upon the principle here stated, have been available. He was persuaded by a religious enthusiast and induced to believe "that a great change of things in this world was about to take place; that the Messiah was to come out of his, the enthusiast's, mouth, and that, *if the king was removed*, all the obstacles to the completion of their wishes would be removed also." The *removal of the king* came from that time to be a fixed idea in the mind of Hadfield, and under this delusion he committed the act for which he was tried and acquitted.

It is clear, however, that the doctrine as settled in the case of Hadfield, has not been uniformly adhered to in England, and that, in a case of delusion, recurrence has again been had to the test of ability to distinguish right from wrong. Thus, in the trial of Bellingham for the shooting of Hon. Spencer Percival, which occurred in 1812, twelve years after the trial of Hadfield, (see 1 Collinson on Lunacy 650,) it appeared that he labored under many insane delusions, the principal of which were that his own private grievances were national wrongs; that his losses should be made good by government; that the government refused, and he determined, by shooting its prime minister, to bring his affairs before the country, where he supposed he should obtain justice. The point of delusion seems not here to have been presented, as Lord Mans-

FIELD charged the jury that the single question for them to determine was, whether, when he committed the offence charged upon him, he had sufficient understanding to distinguish good from evil, right from wrong, and that murder was a crime not only against the law of God, but against the law of his country. He was convicted and executed.

In the case of *The King vs. Orford*, (5 Carrington & Payne 168,) the defendant was shown to labor under the delusion that the inhabitants of Hadleigh, and particularly the deceased, were continually issuing warrants against him, with intent to deprive him of liberty and life. Lord LYNTHURST charged the jury that they must be satisfied, before they could acquit the prisoner on the ground of insanity, that he did not know, when he committed the act, what the effect of it, if fatal, would be, with reference to the crime of murder. That the question was, did he know that he was committing an offence against the laws of God and nature? On a careful examination of the whole case it is pretty apparent that the point Lord LYNTHURST decided was, that a man who, under an insane delusion, shoots another, is irresponsible when the act is the product of the delusion. In confirmation of this was the verdict of the jury, which was one of acquittal on the ground of insanity.

There is little doubt but that in this country a delusion or hallucination completely established, and sufficiently connected with the act done, would divest it of the character of crime. The question first arising is, how is the fact of the entertainment of delusion or hallucination to be arrived at? There seems but one way of doing this, and that is by giving in evidence the acts and declarations of the defendant himself in reference to this point. Those acts and declarations are accordingly admissible for the purpose of showing the state of mind of the party, and that whether they were done or made before or after the doing of the act complained of. *Lake vs. The People*, 1 Parker's Crim. Rep. 495. The effect of the hallucination thus ascertained must be pronounced by the law. If any facts are in dispute it is for the jury alone to find them. The establishing the fact of delusion, and the tracing the act complained of to it as its direct, natural, or necessary consequence,

makes out a perfect defence. Under this principle Hadfield was properly acquitted, and Bellingham should have been acquitted also. The case of *The People vs. Lawrence*, 48 Niles' Register 119, does not seem to come so completely within the principle, although the doctrine as settled in *The King vs. Hadfield*, resulted in the acquittal of the prisoner. Lawrence labored under the delusion that he was entitled to the English crown, and applied to General Jackson, then President of the United States, for the grant of a sufficient sum of money to enable him to assert his right to it. The general refused the grant, upon or after which Lawrence endeavored to shoot him by discharging at him a pistol. The doubt here would be whether the act was sufficiently connected with the delusion.

In the case of *Freeman vs. The People*, 4 Denio 10, the prisoner was tried on a charge of murder, and was shown, on the trial, to possess a very limited capacity, and to have been laboring under some delusions or hallucinations as to his right to obtain compensation for services rendered in the state's prison at Auburn, N. Y.; and failing to obtain anything by endeavoring to commence suits, he supposed he must commence killing for that purpose, and actually killed four in the family of Van Nest, and badly wounded another. In this case the question presented to the court was no other than the finding whether the capacity to distinguish between right and wrong was a finding of sanity. And the court say that this, (the capacity to distinguish between right and wrong,) as a test of insanity, is by no means invariably correct, for while a person has a very just perception of the moral qualities of most actions, he may, at the same time, as to some one in particular, be absolutely insane, and consequently, as to this, be incapable of judging accurately between right and wrong. That if the delusion extends to the alleged crime, on the contemplated trial, the party manifestly is not in a fit condition to make his defence, however sound his mind may be in other respects.

The third test is where the defendant is impelled by a morbid and uncontrollable impulse to commit the particular act. The state of mind which originates such an act has been variously denominated.

The more general term is *moral insanity*. It has also been called *impulsive insanity*; and a term more recently proposed is that of *volitional insanity*. Here lie more especially the unsolved problems of the law. This state of mind, or species of insanity, is by no means universally admitted. Even the medical profession are not agreed in its admission, although those the most conversant with the insane are the more generally in its favor. To show what it is, I will give, as a sample, the statement of one afflicted with it:—
“I was lying on the sofa, and my wife and children were sitting by the fire; I had been talking to them very comfortably, when suddenly my eye caught the poker,—a desire came upon me which I could not control; it was a desire to shed blood. I combated with it as long as I could. I shut my eyes and tried to think of something else, but it was of no use; the more I tried the worse I became, until at last I could bear it no longer, and, with a voice of thunder, I ordered them all out of the room. Oh! had they resisted—had they opposed me, I should have murdered them every one. I must have done it; no tongue can tell how I thirsted to do it.” At the time this statement was made the physician found him in a state of great agitation, countenance flushed, eyes unusually bright and shining, pulse rapid, breathing hurried and disturbed, as though he was just recovering from some violent mental commotion. It would appear from this statement that there was

1. No preternatural defect, or want of mental power.
2. No delusion or hallucination was present.
3. No absence of the moral sense, or power of distinguishing between right and wrong.
4. No perversion of his natural affections, as his love for his wife and children seems unabated.
5. None of the indications of a demented or insane mind seem here to be present; and yet the physical indications proclaim to the physician that some unseen but mighty influence is at work somewhere in the system, and most probably in the brain. And yet, with this disagreement among the doctors, and the conservatism and attachment to precedents with the courts, it is slow

indeed in obtaining a foothold there. Questions of this kind have much the most frequently arisen in the lower courts, and hence are only to be found in newspapers, pamphlets, and periodicals. This malady is recognised and ably described by Chief Justice GIBSON, of Pennsylvania, in his charge to the jury, as given in Wharton & Stillé's Medical Jurisprudence, § 54. "There is," says he, "a *moral or homicidal* insanity, consisting of an irresistible inclination to kill or to commit some other particular offence. *There may be an unseen ligament pressing on the mind, drawing it to consequences which it sees but cannot avoid, and placing it under a coercion which, while its results are clearly perceived, is incapable of resistance.* The doctrine which acknowledges this mania is dangerous in its relations, and can be recognised only in the clearest cases. It ought to be shown to have been habitual, or at least to have evinced itself in more than a single instance. It is seldom directed against a particular individual; but that it may be so, is proved by the case of the young woman who was deluded by an irresistible impulse to destroy her child, *though aware of the heinous nature of the act.* The frequency of this constitutional malady is fortunately small, and it is better to confine it within the strictest limits. If juries were to allow it as a general motive, operating in cases of this character, its recognition would destroy social order as well as personal safety. To establish it as a justification in any particular case, it is necessary either to show, by clear proofs, its contemporaneous existence evinced by present circumstances, or the existence of an habitual tendency developed in previous cases, becoming in itself a second nature."

So, also, Judge LEWIS, recently chief justice of Pennsylvania, says, "Moral insanity arises from the existence of some of the natural propensities in such violence, that it is impossible not to yield to them. It ought never to be admitted as a defence, until it is shown that these propensities exist in such violence, *as to subjugate the intellect, control the will, and render it impossible for the party to do otherwise than yield.* Where its existence is fully established, this species of insanity relieves from accountability to human laws." That this species of insanity exists and is distinctly

recognised by the medical profession and by courts of law is obvious from the following references:—See *Article by Dr. Woodward*, 1 Amer. Journ. of Insan. 322; *People vs. Kleim*, 2 Id. 245; *Review of Case of Abner Baker*, 3 Id. 26; *Case of Reibello*, Id. 41; *Essay by Dr. Aubanel*, Id. 107; *The People vs. Griffin*, Id. 227; *The People vs. Sprague*, 6 Id. 254; *Same Case*, in 2 Parker's Crim Rep. 43; *Commonwealth vs. Furbush*, 9 Amer. Journ. of Insan. 151; *Warren's Remarks on Oxford and McNaughten's Case*, 7 Id. 318; *Commonwealth vs. Rogers*, Pamphlet issued by Bemis & Bigelow, also in 1 Amer. Journ. of Insan. 258, and 7 Metcalf 500; *Commonwealth vs. Mosler*, 4 Barr 266; *State vs. Spencer*, 1 Zabriskie 196; *Trial of Willard Clark*, 12 Amer. Journ. of Insan. 212; *Daniell on Impulsive Insanity*, Amer. Journ. of Insan., July number for 1846, p. 10; *Paper read before the Judicial Society, by Forbes Winslow, M. D., D. C. L., on the Legal Doctrine of Responsibility in Cases of Insanity connected with alleged Criminal Acts*, 15 Amer. Journ. of Insan. 156; *The Case of John Freeth*, 15 Id. 297; *Dr. Ray's Examination of the Objections to the Doctrine of Moral Insanity*, 18 Id. 112; and *Dr. J. Parigot on Moral Insanity in relation to Criminal Acts*, noticed in 18 Id. 305.

The difficulty with courts has not been so much the recognition of this species of insanity as the settlement of the tests to be applied and the forms under which it is admissible. There is a natural and proper reluctance to departing from the old tests which immemorial custom and usage have so long approved and sanctioned. And yet these, without so far stretching as to endanger that distinctive character which constitutes their value, are inadequate to the embracing of this species of insanity. The plain reason is that it is a species which was utterly unknown when these tests were adopted. We accordingly witness in very many of these cases an anxious reaching out by the court, either so to expand or enlarge an old test, or to propose some new one, under which this phase of insanity may be included. Thus, Chief Justice HORNBLOWER, in the *State vs. Spencer*, 1 Zabris. 196, says, "In my judgment, the true question to be put to the jury is, whether the prisoner was *insane* at the time of committing the act; and in

answer to that question there is little danger of a jury's giving a negative answer, and convicting a prisoner who is proved to be insane on the subject-matter relating to or connected with the criminal act, or proved to be *so far and so generally deranged* as to render it difficult, or almost impossible, *to discriminate between his sane and insane acts.*"

In *The People vs. Kleim*, above referred to, Judge EDMONDS says, "If some controlling disease was in truth the acting power within him, which he could not resist, or if he had not a sufficient use of his reason to control the passions which prompted the act complained of, he is not responsible; but we must be sure not to be misled by a mere impulse of passion, an idle frantic humor, or unaccountable mode of action, but inquire whether it is an absolute dispossession of the free and natural agency of the human mind." He also reminded the jury that they were to bear in mind that the moral as well as the intellectual faculties may be so disordered by the disease as to deprive the mind of its controlling and directing power.

In the case of *John Freeth*, a Pennsylvania case, before referred to, Mr. Justice LUDLOW, in his charge to the jury, says, "Besides the kinds of insanity to which I have already referred, and which, strictly speaking, affect the mind only, *we have moral or homicidal insanity*, which seems to be *an irresistible inclination to kill, or to commit some other particular offence.* We are obliged by the force of authority to say to you, that there is such a disease, known to the law as homicidal insanity." And again, "if the prisoner was actuated by an *irresistible inclination to kill*, and was utterly unable to *control his will, or subjugate his intellect*, and *was not actuated by anger, jealousy, revenge, and kindred evil passions*, he is entitled to an acquittal, provided the jury believe that the state of mind now referred to has been proven to have existed without doubt, and to their satisfaction."

In the *Trial of Willard Clark*, before referred to, in Connecticut. Hon. WM. W. ELLSWORTH charged the jury that, "If, at the time of the alleged offence, the prisoner had capacity and reason enough to enable him to distinguish between right and wrong in this

instance, or to understand the nature, character, and consequences of the act, and could apply his knowledge to this case. *not being overcome by an irresistible impulse arising from disease*, then he was an accountable being, but otherwise he was not."

In the *Commonwealth vs. Rogers*, before referred to, a Massachusetts case, Chief Justice SHAW, a high authority in the law, thus charged the jury: "If it is proved to the satisfaction of the jury, that the mind of the accused was in a diseased and unsound state, the question will be, *whether the disease existed to so high a degree, that, for the time being, it overwhelmed the reason, conscience, and judgment*, and whether the prisoner, in committing the homicide, *acted from an irresistible and uncontrollable impulse*; if so, then the act was *not the act of a voluntary agent, but the involuntary act of the body, without the concurrence of a mind directing it.*"

It is submitted that the charge of the late chief justice, in this case, embraces all the elements that are necessary for the protection both of the accused, if really laboring under this species of insanity, and of the community if he is not. It will be noticed that the first point to establish is the *disease and unsound state* of the mind. Here appropriately comes in the paper of *Dr. J. Parigot*, before referred to, in which he insists upon the fact that mental disease cannot be predicated *where there are no physical signs*; and that, for law purposes, insanity may be defined "*the loss of power of control either over one or more of our mental faculties, including especially the absence of free will, demonstrated by moral and physiological symptoms.*" That, in a medical point of view, it is an diopathic or sympathetic disease of the brain, which interferes with the psychological and physiological functions of this organ. In the illustration we have given of this species of insanity, there were physiological indications plainly significant of disease; and it is apprehended generally that a power thus terribly seizing upon the mental faculties, depriving them of the exercise of all voluntary power, and arresting instantaneously their normal action, compelling them to move in new directions, and under new impulses, leaving at the same time the mind free from all delusion,

and with the perfect ability to comprehend and be shocked by the enormity of the act, must necessarily reveal itself in the organization by symptoms that are unmistakeable in their character. If the jury are required to find the sufficiency of these, and also the irresistibility of the impulse under which the act is done, it will rarely occur that crime will go unpunished, or the community be rendered unsafe.

A. D.

Superior Judicial Court of Maine. Penobscot Co. 1862.

JULIA A. FOSTER vs. RUFUS DWINEL.

1. A tenant in an action of dower is not estopped from showing that the seisin of the husband was not such as to give his wife a right of dower, where he or his grantor has accepted a deed of the premises from the husband and claims under it, although he may be estopped from denying the right of the husband to give the deed.
2. Estoppels are mutual. The wife is not estopped if the husband, in a deed, states his title—as one not giving dower.
3. Dower is no part of the estate of the husband, but an independent and inchoate right, which may become an interest in the estate after his death, if his seisin was such as to give it. But the law will not create this estate by the operation of an estoppel where it otherwise would not exist, where the tenant has simply accepted a deed from the husband, which does not allude to the matter of dower or to the existence of the wife.
4. Where it appears in the deed from the husband, that his title is only that of a mortgagee before foreclosure, no estoppel can arise.
5. The wife of a mortgagee cannot claim dower in an estate until the same is foreclosed by the husband.

Action for dower. Marriage. Death of the husband and demand admitted. The seisin of the husband in such a manner as to entitle his wife to dower denied. It was agreed that the husband, with two others, during the coverture, received a deed of mortgage of the premises, and entered to foreclose; but before the expiration of the three years allowed for redemption, conveyed the land, by deed of release and quit claim, to Benjamin Lincoln under whom the tenant, through sundry mesne conveyances, holds and claims the same.

Joseph Granger, for defendant.

John A. Peters, for tenant.

KENT, J.—The issue joined in this case is upon the seisin of the husband during coverture. The defendant denies that the husband was so seised of a dowable estate.

Two questions arise:—

1st. Is the defendant estopped from denying such seisin, and from establishing by proof that the husband's seisin was such that a right of dower ever existed?

2d. If not, was the seisin of the husband, on the facts agreed, such as to give a right to dower in the premises?

In relation to the first point, we find that the tenant has derived his title from the husband through mesne conveyances: the deed from the husband and two others having been given to Benjamin Lincoln, from whom the title was passed to defendant.

It is insisted, in the first place, that the tenant is estopped to deny that the wife is entitled to dower, because the tenant has derived his title from the husband; and this without reference to the nature of the conveyance from the husband, whether a deed of warranty, or a mere release or quit claim. It is contended that when the tenant holds under a conveyance from the husband, whatever its form, he is estopped from controverting the seisin of the husband, and from showing that it was not such as to entitle his wife to dower. The doctrine asserted goes beyond the rule that the production of a deed of conveyance from the husband is evidence that the tenant claims and holds under that deed is *prima facie* sufficient to establish the claim of the widow to dower. It is uncontrolled; but it claims that it is not to be controlled by any evidence, and that the doctrine of estoppel comes in and excludes absolutely every other fact.

It is undoubtedly true that this principle is to be found, more or less directly asserted, in many cases in this state, and in New York and other states. *Kimball vs. Kimball*, 2 Green 226; *Nathan vs. Allen*, 6 Green 243; *Smith vs. Ingalls*, 13 Me. 284; *Caines vs. Gardner*, 10 Me. 383, and other cases; *Bancroft vs. White*, 1 Caines 185; *Hitchcock vs. Harrington*, 6 John. 290:

Brown vs. Potter, 17 Wend. 164, and several other cases in New York.

It is equally true that in New York this doctrine, which had been deemed settled there for forty years, has been overruled, and the contrary doctrine fully established. *Sparrow vs. Kingman*, 1 Comstock 242; *Finn vs. Sleight*, 8 Barbour 401.

In our own state, in the case of *Gammon vs. Freeman*, 31 Me. 248, the point was made, and thus disposed of by SHIPLEY, C. J.:—"It is insisted that the tenant is estopped to deny the seisin of the husband, as he holds the estate by a title derived from him; while he may not be permitted to deny that the husband was seised, he may be permitted to show the character of that seisin, and that it was not such that his widow would be entitled to dower." This principle is indicated in *Campbell vs. Knights*, 24 Me. 232. The same doctrine is found in *Moore vs. Esty*, 5 N. H. 479.

In the last edition of Kent's Commentaries (vol. iv. p. 38, note) it is stated that the law in New York is now established as declared in the recent cases.

In the able and instructive work by Prof. Washburn, on Real Property, the author evidently doubts the soundness of the early decisions, and inclines to consider the recent cases to be in accordance with the doctrines of the common law and the principles on which they are based. See also *Gardner vs. Greene*, 5 R. I. 104. (hereafter more fully stated.)

In this state of the authorities, we may be at liberty to consider the questions raised in this case as in doubt, and the former decisions as shaken, if not overruled.

We may the more properly do so, when we find that such able jurists as Judge COWEN and Judge BRONSON of New York, whilst yielding to the apparent force of the earlier authorities, both admit that the doctrine of estoppel, in their judgment, was improperly applied to cases of dower, and cannot be sustained upon principle. 2 Hill 308; 1 Comstock 242.

If the tenant is estopped it must be because his grantors accepted a deed from plaintiff's husband. Why should that fact estop the defendant from showing that the husband was not seised in such a

manner as to give a right of dower? It is unnecessary to go over all the learning and all the nice distinctions to be found in the books and in adjudged cases. The definition given by Lord Coke of an estoppel is not calculated to recommend it to one in search of truth and the right of the case:—"An estoppel is where a man is concluded by his own act or acceptance to say the truth." It is, nevertheless, a doctrine, when strictly guarded and applied, of essential importance and perfectly just and reasonable. It is based on the great principle of right, that a man shall not be permitted to contradict what he has solemnly affirmed under his hand and seal; nor shall he deny any act done or statement made, when he cannot do so without a fraud on his part and injury to others. When a person gives a deed he is not allowed to deny or contradict anything distinctly stated as a fact. There must be certainty of allegation, and a particular and not a general recital. Roll. Ab. *Estoppel*, pl. 1-7; 1 Show. 59; *Doe vs. Buckenell*, 2 Barn. & Ad. 278.

But this is a case of *accepting*, not *giving*, a deed. There has been some obscurity introduced into the cases, by not distinguishing between a deed indented and a deed poll. An indented deed is considered as the deed of both and of each party, and the statements and recitations therein, the words of each, and therefore both are bound and estopped thereby. 1 Shep. Touch. 58. But a deed poll is of one part, and is the deed and language of the *grantor* only. Co. Litt. 47 b, 368 b. But there may be an estoppel *in pais* "by acceptance of an estate." Co. Litt. §§ 666-7. This rule applies to cases where, by denying the title, the rights of the landlord or some party would be injuriously affected thereby. As when a deed accepted creates the relation which imposes on the grantee a duty or obligation, express or implied, at some time, or in some manner, to surrender the premises to the grantor or his heirs or assigns, as landlord and tenant, trustee, mortgagor and mortgagee. There must be remaining some right in grantor and some duty towards him in grantee in relation to the surrender of the estate. *Williston vs. Watson*, 8 Pet. 47; *Watkins vs. Holman*, 16 Pet. 58; *Doe vs. Barton*, 11 Ad. & El. 807. A grantor

in fee is under no such obligation. *Small vs. Proctor*, 15 Mass 499; *Fox vs. Widgey*, 4 Green. 218; *Sparrow vs. Kingman*, 1 Comst. 248.

A man who takes a warranty deed in fee, is not estopped from denying the seisin of his grantor, or from alleging his want of title, or the existence of encumbrances. If he were, no action could be maintained on the covenant of seisin, or on any covenant in the deed. *Small vs. Proctor*, above.

It is now settled in this state (overruling the case of *Fairbanks vs. Williamson*, 7 Green.) that where a party has given a quit claim deed, he is not estopped from setting up his title, subsequently acquired, unless by so doing he is obliged to deny or contradict some fact alleged in his former conveyance. *Pike vs. Galvin*, 29 Me. 185. It follows, *a fortiori*, that a grantee, who merely takes a deed, cannot be estopped to deny the title, or to acquire a new and independent one, unless by so doing his acts work a fraud or injury upon the legal rights of some other person. *Right vs. Buckenell*, 2 Barn. & Ad. 278.

It is a well settled rule that estoppels must be *mutual*, i. e. both parties must be bound. In the case of *Grant vs. Wainman*, 3 Bingham's N. Cases 69, it appeared that the tenant took land from the assignees of demandant's husband by a deed which described them as *freehold*; and it was held that he was not estopped by taking that deed, as against the demandant *in dower*, from proving that the estate was in fact *leasehold*, in which the widow was not entitled to dower. The reason given is, that every estoppel must be reciprocal—that is, must bind both parties (Co. Litt. 352 a); that, in this case, if the defendants had taken a deed of premises *as leasehold* only, when in fact they were *freehold*, the widow would not be estopped from proving the fact, notwithstanding the recital in the deed. The ground of this decision seems to be, that the wife or widow is not a party or privy to the conveyance. Her claim is by a title paramount and distinct, and, therefore, she is not estopped; and, on the doctrine of mutuality, the tenant cannot be estopped. If the husband, in our mode of conveyance by deed, should, in his deed, describe his estate as one for life or

a term of years, when in fact he had a fee, his widow might claim dower, and sustain her claim by proof of the facts. *Campbell vs. Knights*, 24 Me., before referred to.

In this last case it appeared that the demandants were mortgagees, and the husband only mortgagor; that, after the death of the husband, his administrator sold his right in equity under license; that, prior to such sale, the widow's dower in these premises had been set out to her. The mortgagees purchased the equity at the sale by administrator, and took a deed from him, in which were these words: "reserving from this conveyance the widow's dower, which has been assigned and set out heretofore." It was contended that the demandants, by accepting a deed with this reservation, were estopped to deny that the dower had been properly assigned, and that the widow was entitled to dower as against them. The court held that the admission could not be extended beyond its exact terms; that estoppels are mutual; that, in this case, the clause did not admit, as respected themselves as mortgagees, that her husband died seised, or that she was entitled to dower in the premises, and that they were not precluded from establishing a title which may be good and not inconsistent with their admissions; that, if their title under the mortgage was still outstanding, they would be entitled to recover, even as to the parts set off as dower, and the widow must redeem to be entitled to dower. The case of *Gardner vs. Greene*, 5 R. I. 104, is directly in point. It is there held that the acceptance of a deed poll, conveying with covenants of warrantee lands purchased, and taking and holding possession under it, do not estop the grantee from disputing the grantor's title to such lands, prior to and at the time of the conveyance, upon a subsequent claim of dower in the lands by the widow of the grantor.

The reasoning of the court in this case fully sustains the ground taken by the tenant in the case before us. If we depart from technical rules, and inquire what there is in the nature of an estate in dower that should give it this right of creation out of the mere fact that the tenant, or those under whom he holds, took a

title from the husband, we may be at a loss to discover any substantial reason.

We have seen that a widow cannot be defeated of her dower by any declarations or recitals of her husband. Why should she be allowed, as against the truth, to create this right, when it never existed, by the mere fact that a title of some kind has been taken from the husband? If it were true that every seisin of the husband, which gave him a right to convey an estate or interest in it, was necessarily a *dowable* seisin, there would be more force in the argument. But this is not true. A man may have only the estate and right of a mortgagee, which will not give dower, and yet he may properly give a deed of the premises. *Hutchins vs. Carlton*, 19 N. H. 487; 15 N. H. 55.

There are many other cases where the title in the husband may give him a seisin and a right to convey his interest, and yet not in law give the wife a right of dower. The right of dower is an inchoate right. It lies dormant during the life of the husband. It may never become operative. It is not, properly speaking, any part of the husband's estate during his life. It is an independent inchoate right in his estate, if his seisin is such as to give the right of dower after his death. *Barbour vs. Barbour*, 46 Me. 1. It would seem to be a great stretch of the doctrine of estoppel to say, that by *accepting* a deed from the husband, which in no way alludes to the matter of dower, or to the existence of a wife of grantor, the tenant is not only estopped from denying an actual seisin in the husband, sufficient to enable him to give the deed, but is also estopped from denying that the seisin was such as to give a third person an independent right in the estate, although, in truth, no such seisin ever existed, thus creating an estate by a rule of law where none ever before existed.

But, looking at the case before us on the ground that the defendant is estopped from denying anything expressly and particularly set forth as statement in the deed which he received, the question arises, What is thus stated in the deed from the husband? Is there any admission of a seisin in the husband which will give the wife dower? No man is estopped where the truth appears in

the same deed. Co. Litt. 352-6; Com. Dig. *Estoppel*, E. 2. The language of the deed is this: "meaning hereby to convey the same premises which was conveyed to us by Ransom Clark, by his mortgage deed, dated July 11th, 1835, and recorded in Penobscot's Registry, vol. 71, p. 142 "

If the tenant is estopped by the recital, what is that recital? Is it anything more than that the title of the husband was that of mortgagee? There is no averment that the mortgage had been foreclosed; and the admission cannot be carried beyond what is affirmed "with certainty and particularity." The title and seisin named in the deed is not such as gives a right of dower, being only the title of a mortgagee. The tenant's grantor *accepted* only such an estate as is described in terms in the deed, and in any event an estoppel cannot arise by the assumption of the existence of any fact not clearly and distinctly stated in the deed. On the deed itself, therefore, no estoppel arises in this case.

If the tenant may be allowed to prove the nature and extent of the seisin of the husband, and to show that it was not a dowable seisin (as we think he may), the facts agreed upon show that the husband never had any other title or interest in the premises than that of a mortgagee, who had entered for foreclosure, but had not perfected it. The deed from the husband was delivered before the expiration of the three years after entry to foreclose. This deed, upon inspection, appears to be a quit claim, and not a warrantee deed, as stated in the report of the case. It is well established law that the wife of a mortgagee cannot claim dower in an estate, until the same is foreclosed by the husband. 4 Kent's Com. 48; 4 Dane Abr. 671; Washburn on R. Actions, ch. 7, § 15.

The husband in this case was never so seised as to give his wife a right to dower in the premises.

Plaintiff, nonsuit.

[*Same Term.*]

JULIA A. FOSTER vs. SYLVESTER GORDON.

This case, in most of its facts, resembled the foregoing case, *vs. Dwinel*. The only seisin and right that the husband had was

derived from a levy of an execution in his favor on his debtors' property. The husband gave a deed, of quit claim, under which tenant claims, before the expiration of the year allowed for redemption to the debtors. It was decided that the husband had no seisin that gave his wife a right of dower in the land levied on.

Granger, for plaintiff.

Briggs, for defendant.

We are indebted to the courtesy of Mr. Justice KENT for the foregoing very able and satisfactory exposition of the law of estoppels by deed, as applicable to the subject of dower, and how far the rights of the grantee of the husband are liable to be affected by the acceptance of the deed of the husband.

1. There is no rule of law better established than that estoppels, to be binding, must be mutually so upon both parties. 3 Thomas Coke 342; Co. Litt. 352, b. "Every estoppel ought to be reciprocal, that is, to bind both parties." This extends to privies in blood, and in estate. Under the latter, is here enumerated "tenant by dower." But in *Gaunt vs. Wainman*, 8 Bing. N. C. 69, which was a writ of dower, where the tenant pleaded that the husband of demandant had no endowable estate in the premises, it was objected that he was estopped to set up that fact, by having accepted a deed from the husband's assignees, wherein the premises were described as *freehold*. But the court, on argument, TINDAL, Ch. J., held that the estoppel, not binding the wife, could not bind the grantee of the husband's estate. The learned judge quoted the above text from Co. Litt., and further, "And this is the reason that regularly a stranger shall neither take advantage nor be bound by the estoppel," and adds, "It would be hard if it were otherwise."

The point seems to be here assumed, on all hands, that the deed of the husband is no estoppel upon the wife, even as to the husband's title.

2. This last case seems to us a full authority for the decision in the principal case. And the fact that the New York courts have adopted the same view, after enforcing the estoppel upon the grantee of the husband for many years, would seem to justify the expectation that this rule would ultimately prevail.

The doctrine of estoppels is based upon the policy of holding the party, to a deed, or judgment, bound by the admissions and implications growing out of the instrument, or act, and it is part of the policy of the law, not to carry the estoppel beyond the clear and natural import of the words; and it is never extended beyond the parties, and privies, in blood, and in estate. As the estate of dower is one derived from the husband, by a quasi inheritance, although the wife may be said to hold, as purchaser, and in her own right, yet her estate being dependent, not only upon that of the husband, but also upon the contingency of her surviving him, it seems to us there is more plausibility in holding the wife, as privy in estate with the husband, and so entitled to claim the benefit of, and bound to submit to, all estoppels binding upon him in regard to the estate that we have seen intimated

in the case. And the earlier cases in New York, referred to in the principal case, and in some of the other states, seem to have gone upon this ground, without very clearly defining it. *Wedge vs. Moore*, 6 Cush. R. 8; *May vs. Tillman*, 1 Mich. R. 262; *Thompson vs. Egbert*, 2 N. J. 459. But a different view was taken in *Crittenden vs. Woodruff*, 6 Eng. (Ark.) R. 82. See also *Hugley vs. Gregg*, 4 Dana 68. The more recent cases in New York seem to admit of no question in regard to the conclusive authority of *Sparrow vs. Kingman*, 1 Comst. R. 242. See to this effect, *Finn vs. Sleight*, 8 Barb. R. 401. So that the estoppel seems there to have been abandoned.

It seems therefore an unsettled question, to some extent. And while we naturally feel, that the express decision of the English courts, and that of three of the American states, including New York, must give an impetus in that direction which it will be impossible to resist, we nevertheless cannot comprehend how there is any injustice, or violation of principle, in enforcing the estoppel, both against the wife, who succeeds to an estate in virtue of her husband's title, and which is carved out of that title, and also against the husband's grantee. If the question depended solely upon the application of fundamental principles, we might incline in this direction. But the tide of authority certainly seems to be setting, very strongly, in the opposite direction. And as no injustice is done, by narrowing the application of such estoppels as exclude the truth, the very class of which it has been so often, and so justly, perhaps, affirmed, that as they exclude the truth, they should not be favored, we would certainly not be understood, as having formed any very clear opinion that the estoppel could be made to apply, both to the wife and the grantee of the husband,

without too great refinement upon the nature of an estate in dower. And unless the estoppel can be made mutual it surely cannot be held binding, without injustice, and an entire departure from the fundamental quality of the thing.

But it has seemed to us, upon a hasty view of the subject, that the fallacy, if any, consists, in admitting, that the estoppel in regard to the husband's title, does not bind the wife. The fact that the husband conveys a *leasehold* interest does not show that he does not claim to own, and the grantee does not admit, that he does, in fact, own, a *freehold* in the premises at the same time. That is often the case, no doubt, and may always be supposed to be, in the case of a leasehold conveyance, without conflict either with the deed, or its implications. It may well be said the conveyance of the lesser estate, unless there is some declaration to that effect, by no means implies that the husband did not, at the date of the deed, claim to have a larger estate. And this is the only class of cases in which it seems to have been admitted, that no estoppel exists against the wife showing that the husband had a larger estate.

But suppose the husband conveys his whole interest in the premises, and it appears by the deeds, under which he claims title, which thereby become part of the estoppel by deed, that the husband never purchased, and never claimed any larger estate, than a mere chattel interest, for a term of years, is not the wife bound by this estoppel? If not, there is certainly a very great uncertainty in regard to the application of estoppels by deed. Any purchaser under the husband would be so estopped in regard to all others, in the privity of blood or estate, and we see no good reason why the wife should not be, provided the *bonâ fide* character of the deed as to her is esta-

blished. She is regarded as a purchaser of the right of dower, because marriage is a valuable consideration. She therefore derives her title under the same title by which the husband holds, and in regard to the incidents of estoppel, we do not perceive that it would make any difference if the husband, by deed, should convey to any one, man or woman, an estate in all lands in which he had an inheritable interest, of which he was then seised, or might become thereafter seised, during his life. In making this supposition we lay out of the account the effect of the registry and the rights of creditors, and all questions of collusion between the husband and his grantee for the purpose of defeating such estate.

Supposing then the wife to have purchased, in form, as well as in fact, the contingent right of a life interest in all the husband's estates of inheritance, during his life, to begin only at his decease, and the husband to have conveyed an estate to some third party, as a leasehold estate, and in regard to which it appeared that he only purchased and received a conveyance of a leasehold interest, and claimed the same only under such conveyance. It would certainly be unjust and unreasonable to allow the wife to defeat the estate of the grantee of the husband, during her own life, by setting up a different estate in the husband from any ever purchased, or claimed by him, and from that conveyed by him, and *bonâ fide* purchased of him.

There is indeed one consideration in regard to holding the wife bound by estoppels, in the husband's deed, already alluded to, which should not escape notice; that is, where the husband conveys an estate of *inheritance* in fact, describing it as a life estate, or for years, for the mere purpose of defeating the wife's right of dower. This would seem a sufficient reason why estoppels created by the husband should not operate against

the wife, unless it also appeared they were *bonâ fide*, on his part. So that to render the estoppel complete against the wife, it seems requisite that the title conveyed by the husband should correspond with that conveyed to him and claimed by him during his tenure, or in some other way that it was *bonâ fide*.

We must conclude therefore that any estoppels binding upon the husband, and which existed at the date of the marriage, or which were created subsequently, and at the time of their creation were against the interest of the husband, or in any other way shown to be *bonâ fide*, do bind the wife as a privy in estate, and to that extent, the grantees of the husband are estopped, in a suit for dower, to deny any fact appearing in their deed from the husband. At least such is our view of the true application of the doctrine of estoppel by deed to the subject in question, if the subject were *res integra*.

It is probable that the fact of the wife's estate dating from the marriage, and the husband having an incidental interest in defeating the contingent estate of the wife, may be sufficient ground to reject, as to the wife, all estoppels created by the husband, during the coverture, and which operate in favor of the husband and against the interest of the wife, if any such can be conceived, without implying collusion and fraud, which will defeat the deed itself, and, by consequence, any estoppel dependent upon it.

It will thus be perceived that the subject is one not free from embarrassment, whether we attempt to determine it upon the ground of principle or authority, and therefore we are by no means sure, the English case of *Gaunt vs. Wainman*, *supra*, and those which have followed in its wake, in setting aside all estoppels created through the intervention of the husband, after the date of the marriage, whether operating in his favor or against

our interest, or that of the wife, may not have pursued the wisest and fairest course. The more we reflect upon the subject, and the further we have examined and considered the rules of law, and the decisions of the court, upon the subject, the more fully we have become reconciled to this view. We can there-

fore adopt the views of Mr. Justice Kent, so satisfactorily presented, without any misgivings, notwithstanding any impression we might have, that the courts might in the first instance have adopted some middle course, more consistent with principle and analogy, if not as simple and easy of application. I. F. R.

In the Supreme Court of Michigan.

JAMES A. RICE vs. JOHN RUDDIMAN.

The rule of riparian proprietorship upon the river Detroit, as laid down in *Lorman vs. Benson*, 8 Mich. 18, is applicable to Lake Muskegon; and the ownership of land bordering upon the lake, carries with it the ownership of the land under the water, so far out as it is susceptible of beneficial private use, but subordinate to the paramount public right of navigation, and the other public rights incident thereto.

Error to the Circuit Court for Muskegon County.

Walker & Russell, for plaintiff in error.

G. F. N. Lothrop, for defendant in error.

CHRISTIANCY, J.—The errors assigned, raise the question whether riparian ownership of lands along Muskegon Lake is to be governed by the law applicable to tide-waters, or substantially by the common law rule applicable to fresh-water streams above the ebb and flow of the tide.

The plaintiff below appears to have been the owner of fractional section eighteen, town ten north, range sixteen west, bounded according to the United States survey of the public lands, by the water line of the lake. The section was made fractional by the waters of the lake occupying a part of what would otherwise have fallen within its lines. He had executed a mortgage of this fractional section, which had been foreclosed in the United States Circuit Court for the district of Michigan.

Either about the time of the mortgage or afterwards, and before the foreclosure, he had erected a saw-mill and other buildings in the shallow waters of the lake, about twenty-nine rods from the margin or meandered line of the section, but within the area which but for the water would have been within the lines of the section, and at or a little beyond the point where a sand-bar extending from the land sunk below the water; the depth of the water where the mill was built being about two feet. This sand-bar at the time the mill was built furnished the roadway to or very nearly to the mill, but in subsequent higher stages of the water was covered and a roadway was made of slabs to the land, and the space around the mill, or what is commonly known as the mill-yard, was formed by slabs and refuse stuff from the mill. Along the sides of the bar and about the mill the bottom was a soft and muddy deposit in which grass and rushes grew.

The plaintiff in error (defendant below) justifies the taking of possession and the ejecting of the plaintiff below under a writ of possession issued in the foreclosure suit.

The evidence in the case tended to show (and upon this there appears to have been no dispute), that "Muskegon Lake is about six miles long, with an average width of about two and a half miles;" that "the outlet from it into Lake Michigan is about sixty rods long;" and though the evidence is silent as to the width of the "outlet," yet it is evident from this language, that the lake itself does not extend to Lake Michigan, but that it discharges its waters into the latter through a comparatively narrow passage called an outlet, and that this is about sixty rods long. But "the level of the lake is affected by the level of Lake Michigan, and rises and falls with it." It does not appear by the evidence, whether a distinct river channel (of Muskegon river, which flows into this lake and through it to Lake Michigan) can be traced through the lake. Such are the facts appearing in the case, and it is difficult to conjecture how any other facts which might be made to appear, could alter the effect of these upon the question whether this lake is to be considered a part of Lake Michigan. And though it was admitted by both parties, that "for the

purposes of the trial, Lake Muskegon should be considered as an estuary of Lake Michigan, and part and parcel thereof, and not as a widening or continuation of Muskegon river, I am inclined to consider this rather as the admission of a conclusion of law from the facts, than as a mere admission of facts. Whether this lake is to be considered a part of Lake Michigan or as a widening of Muskegon river (so far as it might be material), would be a question of law to be decided upon the facts of the case, and no admission of the parties could bind the court as to the law. The lake in question might partake of the characteristics of both, and the question would then be which predominates. And upon the assumption that a different rule is to be applied to each—which I do not intend to be understood as admitting—I should be inclined to hold that this lake, so far as its character can have any bearing upon the question of riparian ownership, is to be treated as more properly a widening of the Muskegon river or a separate lake, than as a part of Lake Michigan. The only circumstance which I have been able to discover tending to give it the character of the latter, is the fact that it rises and falls with it. If this fact were sufficient to make it a part of Lake Michigan, then it is difficult to see why every other stream large or small which empties into that lake, should not be considered a part of it, so far up as it is affected by the rise and fall of the lake. The rise and fall of Lake Michigan and the other great lakes of the same chain, is not a tide occurring at regular intervals like that of the ocean, nor does it arise from the same cause. And, though it is probable their waters may be slightly affected by the lunar attraction, and a very minute tide may perhaps be detected by a long and careful course of observation with accurate instruments, yet the court must judicially notice, that it must be too slight to be recognised by ordinary observation, or to serve any practical purpose in determining the extent of riparian ownership. This fact was judicially noticed in *Lorman vs. Benson*, 8 Mich. 18. Courts must also be presumed to be so far acquainted with the laws of nature, as to enable them judicially to determine that the rise and fall of these lakes, is governed mainly by the same causes

which affect the rise and fall of the rivers which flow into them, and which rise and fall more than the lakes themselves, and that all the connecting straits between the lakes, such as the straits of St. Mary (or St. Mary's river), the St. Clair and Detroit rivers, must, of necessity, rise and fall with the lakes which they connect. It is a matter of public notoriety, that the waters of Detroit river vary in height at different but irregular periods, to the extent of several feet, from this cause, and quite as much as those of Lake Michigan or Muskegon Lake are shown to vary; yet, we all held in *Lorman vs. Benson*, that the common law rule applicable to streams above the ebb and flow of the tide applied to that river, and I have not been able to discover any fact or circumstance in this case, sufficient to make a substantial difference in principle between that case and the present; I am entirely satisfied with the principles established by that case, and think them substantially applicable to the present. Whether the riparian ownership extends to the centre of the lake is a question not involved in this case; the only question being whether it extends to the place where the mill is erected, which is in the shallow water of the lake some twenty-nine or thirty rods from the shore, on ground which is susceptible of beneficial private use and enjoyment as land. The real question is, whether the ownership of section eighteen bordering upon the lake, carries with it the ownership of the *locus in quo*, not whether it extends beyond, or whether its outward limits in the lake can be defined with precise accuracy. But, if the water continues so shallow as to render the lands under it susceptible of beneficial private use to the centre line of this narrow lake, then I have no hesitation in saying I think the riparian ownership extends to such centre line, unless indeed there may be intervening islands, which the government have shown an intention to reserve from the grant of the main land by surveying them as separate tracts, in which case, the riparian ownership would extend only to the centre line between the island and the main land.

If the waters become so deep in approaching the centre of the lake, as to render the land under them incapable of such private

or individual use, the question of ownership beyond where it is available for such purpose becomes as barren as the use itself, and is of no practical importance whatever. But to deny all riparian ownership under the shallow waters because its outward limits in the lake cannot, *a priori*, without reference to the facts of the particular case, be defined with a precision which shall settle all other cases, would be extremely unphilosophical and contrary to the principles and analogies of the law in other cases. There are many classes of cases, especially where the question is between the rights of individuals and those of the public, in which the precise line cannot be drawn by any general rule applicable alike to all cases. But the law does not, therefore, deny the existence of both public and private rights nor either of them; and the courts, admitting the existence of both, seek to determine the question between them upon the facts of the particular cases as they arise. I do not mean to say that the ownership of the tract here in question, or any other tract bordering upon the lake, must necessarily extend into the lake in the direction of the side lines of the tract; this might depend upon the shape of the lake and the relative rights of adjoining owners. But no such question arises here. When the question arises between adjoining owners, it will not be found difficult of decision within the principle of adjudged cases.

But this riparian ownership does not carry with it the right to the exclusive and unrestricted use of the lands ordinarily covered by the water: as in the case of rivers, that use must, in all cases, be subordinate to the paramount public right of navigation, and such other public rights as may be incident thereto,—in other words, all the private or individual use and enjoyment of which the land is susceptible, subordinate to, and consistent with the public right, belong to the riparian owner as against any other person seeking to appropriate it to his individual use.

These principles, when applied to Muskegon Lake, can no more interfere with the public right of navigation than when applied to rivers. In both cases the ownership is equally qualified by and subordinate to the rights of the public. In fact, navigation is

much more likely to be benefited than injured by the application of these principles. Wharves and other similar erections are essential to the interests of navigation; and, if the bed of the lake to high or low water-mark was vested in the state, no private owner could extend a wharf one foot from the water line, without becoming a trespasser and incurring the risk of losing his improvement, though navigation might be aided rather than injured by it; while, by admitting the riparian ownership as above explained, individual enterprise is stimulated to improvement, and the public interest is subserved. The public, through their proper authorities, have always the right to restrain any encroachment which may be injurious to the public right, and to compel the removal of any obstruction or impediment, as well as to punish the offender to the same extent as if the bed of the lake were vested in the state.

I am not aware that the state, or the federal government, has at any time asserted any right or claim to the beds of the lakes more than to those of the rivers, and I think the same principles of riparian ownership apply equally to both. I speak here of the small lakes *within* the states, because the large lakes on our borders are not involved in the present case, though I am not aware that the state or the United States has ever asserted any claim with respect to the one more than the other, and I must frankly admit, that I have not as yet seen any sound reasons for making a distinction, based upon a difference of size between lakes, more than between rivers: *Jones vs. Soulard*, 24 Howard 40; nor, because some may be a state or national boundary while others are not. But without expressing any opinion upon the large lakes upon our borders, I think the general understanding and common usage of the country, have as clearly recognised the principles of riparian ownership with reference to the lakes as to the rivers within the state, and that this general understanding and common usage have been constantly acted upon; and, that capital and labor to a very great extent have been expended on the faith of them, cannot admit of a reasonable doubt. To repudiate this common usage at this late day, by creating a

arbitrary distinction which has no foundation in the nature of things, and to recognise in the state or the United States a right of property in the beds of the hundreds of lakes and natural ponds within her limits, would, in my opinion, be an unwarrantable interference with private property and do incalculable mischief.

These lakes and ponds are scattered over almost all parts of the state; they impart to the landscape the charm of picturesque scenery, their banks are often selected as favorite sites for residence, and command a high price; these considerations entered into the original purchase from the government and every subsequent purchase. Much, and, in many cases, most of the value of these locations and the residences upon them, consists in the beauty of the prospect which the lakes afford. But if the land under them belong to the state or the federal government, any man may go into the shallow water a few feet from the shore and erect in front of such dwellings, mills, fishing-houses, or such other buildings as his profit, convenience, or malice may dictate, and thereby destroy the beauty of the prospect and the value of the property, and the owner has no remedy but as one of the public at large. The attorney-general could not well interpose for the protection of the owner's private interest alone, and the public right would not in general be impaired.

Some of these lakes form no part of a chain of navigable waters, and are not susceptible of public use for purposes of navigation; some of them are entirely enclosed by the lands of a single owner. If the bed of the lake belongs to the state or to the United States in one case, I do not see why it does not equally in others, wherever it has been meandered by the public surveys. Some startling consequences would flow from such a doctrine, which it is necessary here to notice.

There is much good sense in the observations of the Supreme Court of Ohio in *Gavit's Administrators vs. Chambers*, 8 Ohio R. 15, and they have met with the very general assent of the courts, especially in the Western States. And though these observations are applied to a river, they are, I think, equally applicable to the lakes; and if the beds of these lakes are to be treated "as an

appropriated territory, a door is opened to incalculable mischief. Intruders upon the common waste would fall into endless broils amongst themselves, and involve the owners of adjacent lands in controversies innumerable. Stones, soil, gravel, the right to fish, would all be subjects of individual scramble, necessarily leading to violence and outrage."

I am, therefore, well satisfied, that both public and private interests are best subserved by recognising the principles of riparian ownership in respect to the lakes, substantially to the same extent as applied to rivers.

The charge of the court below, applying to Muskegon Lake the law applicable to tide-waters, was erroneous. The judgment must therefore be reversed with costs, and a new trial granted.

MANNING, J.—On the trial, it was admitted that Muskegon Lake is "an arm or estuary of Lake Michigan, and part and parcel thereof." The charge was based upon this admission, and its correctness must be tested by it.

In *Lorman vs. Benson*, 8 Mich. 18, the common law rule that gives to the owner of land on a river above tide-water, the bed of the stream to the middle of the stream, was held applicable to the Detroit river, which differs from ordinary rivers, only in that it connects two lakes—St. Clair and Erie—having its origin in one and terminating in the other.

To apply this rule to our large lakes, it seems to me would be absurd. To hold for instance, that a deed of one acre of land, in a square form, bounded on one side by Lake Michigan, conveys as an incident to the grant a strip of land of the same width, extending forty or fifty miles into the lake, with the sole right in the grantee to take fish in the waters covering the same—for the ownership of the bed of a stream carries with it this right, (*Hooker vs. Cummings*, 20 Johns. 90; *Angell on Watercourses* 56)—would be an anomaly so great, that it would only need to be stated to be universally condemned.

It does not follow from this, however, that the owners of land on our lakes, have no greater rights in the lakes than the citizens

of the state at large. Whether they have or not is the present subject of inquiry. As individuals, as citizens of the state, they have not. But there may be rights connected with the land itself, growing out of location, public policy, or having some other origin, to which they may be entitled, and which are not common to the citizens of the state at large, or to persons owning lands not thus situated.

We have no legislation on the subject, and in the absence of all legislation the inquiry is, what are the rights of the citizens of the state in our great lakes? They are the rights of navigation and of fishing. These rights are common to all, whether they own land on the lake-shore or not. At the same time, it must be admitted that the owners of such lands have greater facilities for the enjoyment of these rights than others. In this respect they may be likened to a person residing on a highway, while their fellow-citizens generally may be likened to a person residing at a distance from such highway, and who has no means of approaching it except over the land of another. Both have equal rights to the use of the highway when upon it, but the first, by reason of his residence, has a facility for using it which the other has not.

But the similitude fails, or does not hold good, when we attempt to press it further. The highway spoken of being the work of man, all rights connected with it are artificial or conventional. They have no existence of themselves. Whereas the lakes are the work of our Creator, and our rights to them as highways and fisheries are natural and not artificial rights, and may therefore be said to be self-existent rights. The same may be said of the facilities for their enjoyment peculiar to the owners of the land on the lake-shore. These are also natural and not artificial rights, and, like all natural rights, cannot justly be taken from them by the state unless necessary for the good of the body politic, to which all natural rights must yield. They are natural rights incident to location, and of kin to the right of the owners of such land to the lake breeze, or to the exuberant fertility of the soil, should it prove to be more luxuriant than the soil back from the lake. No one would for a moment think of taking away either

of these rights from the owner of the land. And yet the rights of which we have been speaking are as truly rights as either of these.

If what we have said be correct, a well settled principle of law steps in here to aid the plaintiff in error. It is this, that where the law gives a right, it gives with it all minor rights necessary to its enjoyment. Wharves and piers are almost as necessary to navigation as vessels and ship-yards, or places for the construction of vessels, are indispensable. May not, therefore, the owner of the shore, under this rule, use the adjacent bed of the lake for the construction of ways, for the launching of vessels, or of wharves and piers for vessels to lie at and receive and discharge their cargoes? The right of navigation without such right would be incomplete.

It seems to me on principle, as well as reason, that the owner of the shore has a right to use the adjacent bed of the lake for such purposes. Wharves and piers must be constructed by some one; and by whom if not by the owners of the adjacent shore? No one else can construct them, unless it should be the state or some one under its authority. But has the state that right? Can the owner of the shore be cut off from the lake against his consent, without taking from him those natural rights of which we have spoken?

Without deciding this point, the doubt suggested by it may suffice for the custom which has prevailed so long that it may be considered the settled policy of the state, for the owners of the shore to construct such works and to use the bed of the lake for that purpose. In a government like ours such is undoubtedly the true interest of the state. It stimulates individual enterprise, encroaches on no private right, leaves the public rights of navigation and of fishing unimpaired, and turns to a good account what would only be a profitless monopoly in the hands of the state.

Mills and manufactories, unlike wharves and piers, do not add to the conveniences or usefulness of the lakes as highways or thoroughfares; and yet they seem to me clearly to come within the state policy mentioned. A different policy as to them would

depress rather than encourage enterprise, and render that unproductive which otherwise might be made useful. I am, therefore, of opinion that all such constructions connected and used with the shore pass as an incident or appurtenance of the shore in a conveyance of the latter.

CAMPBELL, J.—I concur entirely in the views of my brother CHRISTIANCY. I think the riparian proprietor is entitled to all the control of the bed of the water which can be exercised without damage to the public interest. His right is proprietary and absolute. And while I think that the particular place in controversy is no part of Lake Michigan, I do not regard the distinction as at all material. Usage as well as reason extends to the one as well as to the other. Navigation in our day cannot do without wharves and similar conveniences for loading and shelter, and instead of being universal nuisances, they are in general indispensable aids to it. The inquiries concerning ownership in deep water, far from shore, can never become practical questions, and it cannot make any difference how they are settled. But wherever use can be and is made of the bed of the water, in improvements near the shore, in waters not governed by the artificial common law rules of tide-water ownership, I think the rules applicable to fresh-water rivers are more reasonable and just, and are certainly more conformable to the common understanding and usage. They preserve all valuable public privileges, and interfere with no rights whatever.

MARTIN, C. J.—I concur fully in the views of my brother CHRISTIANCY. I think the rights of riparian proprietors upon our interior lakes—and I regard Lake Muskegon as such, and not as an arm of Lake Michigan, notwithstanding the stipulation which, although it may be taken for true, I regard as immaterial—are the same as these of proprietors upon our navigable streams. They have the right to construct wharves, buildings, and other improvements in front of their lands, and, so long as the public servitude is not thereby impaired, they are a part of the realty and pass

with it. Certainly no one can occupy for his individual purposes the water front of such riparian proprietor, and the attempt of any person to do so would be a trespass. When, therefore, Ruddiman erected the structure in controversy in the shallow water of the lake, and upon his water front, it was substantially an erection upon his own land, and its use and ownership was dependent upon his ownership of the land to which it was appurtenant. He made it a part of his real estate as much as if it had been an additional story erected upon a building situated upon the soil not covered with water. It was a part of the land; appurtenant to it, and to be enjoyed with it. This *he* cannot deny; nor can any one question it whose soil or possession was not thereby invaded. As between individuals, a wharf and the structures upon it attached to the soil of a riparian proprietor, are as much a part of the real estate as is a building erected upon the land over which the water does not flow; and by a sale of the land they are conveyed. There is no analogy between such title and the right of fishery, and no argument can be drawn from the one to support the other. Each depends upon separate principles of the law.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF PENNSYLVANIA.¹

Legacies, Vested and Contingent.—If it be doubtful whether a legacy bequeathed by will is vested or contingent, the law inclines to treat it as vested; and where it is evident from the will, that the testator intended to make an entire disposition of his estate, which intention would be defeated if a legacy given were not vested, it is an influential consideration that the legacy be construed as vested: *Burd's Executor vs. Burd's Administrator*.

A legacy is to be deemed vested or contingent, as the time appears to have been annexed to the gift or to the payment of it; if there be a

¹ From Robert E. Wright, Esq., State Reporter, to be reported in the 4th volume of his Reports.

separate and antecedent gift, which is independent of the direction and time of payment, the legacy is vested: if not, it is contingent: *Id.*

A testator gave to his brother a life interest in the residue of his personal estate, and provided, that "at the death of my brother J., I hereby give and bequeath to my nephew E., son of the said J., two thousand dollars," &c. E., the nephew and legatee, died before his father J., and after the death of both, the legacy was claimed by the representatives of each from the executor, and no provision was made against the lapse of the legacy, in case the legatee died before the testator. *Held*, that the bequest must be construed as reading "It is my will, and I hereby give to my nephew E., at the death of my brother," &c., and that this, taken in connection with the antecedent life interest granted by the testator to his brother, would make the legacy vested, which as such, the administrator of E., the legatee, was entitled to recover: *Id.*

Bills of Exchange—Rights of Drawee who discounts Bill before Maturity.—The acceptor of a bill being the principal debtor, while the drawer and indorser are but sureties, *payment* by the former extinguishes the debt, leaving no right of action against the latter except when the acceptance was *supra protest*: *Swope et al. vs. Ross et al.*

The acceptance of a bill is an engagement to pay it according to tenor and effect at maturity, and not before; and a bill is only "paid" when it is done in due course and with an intention to discharge it: *Id.*

The drawee of a bill may accept or pay it *supra protest* for the honor of the drawer or indorser, but if he discount it before maturity he stands in the position of an indorsee as against all prior parties: *Id.*

The discounting of a bill by the drawee, who has not accepted it, is neither "payment" nor a promise to pay according to tenor and effect, but puts him in the position of an indorsee for value, with right of action against drawer and endorser: *Id.*

Assignment by a Bank for Benefit of Creditors—Right of Indorser to pay Note discounted by it, in its own depreciated Paper, after a bonâ fide Transfer to Assignee.—The indorser of a negotiable note, discounted by a bank and by it transferred to assignees before maturity, for full value, has no right, when payment is demanded by the holders, to pay the note in the depreciated paper of the bank after it has failed: *Housum vs. Rogers & al.*

The Bank of Pennsylvania, through a branch office, discounted a note

upon the credit of an accommodation indorser, which before it came due, was with other notes transferred by the bank to certain trustees of other banks, in consideration of a sum of money advanced by them to sustain its credit: before maturity, the bank failed, but the note was renewed in the hands of the trustees by the parties to it; when due, payment was tendered in the notes of the bank by the indorser to the agent of the trustees, which was refused and suit brought against him upon the note. *Held*, that the plaintiffs were holders for value, and could not be required to receive in payment the depreciated notes of the bank: *Id.*

Though the transfer of the note by the bank was not in the usual course of business, it is not for that reason invalid; and where the transaction was honest, for the benefit of the public and the protection of the stockholders, the legal and equitable title in the note would pass to the trustees, who were entitled to demand payment in constitutional currency or its equivalent: *Id.*

Where the note was transferred for value, and, with knowledge of the transfer and the failure of the bank, the indorser joined the drawers in renewing the note in the hands of the assignees, he cannot call in question the power of the bank to transfer the note under the charter, for he was a debtor and not a creditor interested in the assets of the bank, and, as such, entitled to interfere: *Id.*

Injunction to restrain Creditor of Husband from selling Wife's Real Estate on Execution.—Under the Act of 11th April 1848 and 12th April 1850, the levy and sale of a wife's real estate by a creditor of her husband's, on execution against him, is contrary to law and may be restrained by injunction: *Hunter's Appeal.*

In order to authorize the interference of a court of equity, a clear case of title in the wife under the Acts of 1848 and 1850, must be made out; otherwise the court will not interfere, but leave the parties to their remedy at law: *Id.*

Where the real estate of a wife was levied on by a creditor of her husband's, and was about to be sold, it was error in the court to dismiss a bill filed by her, for a preliminary injunction to restrain the execution-creditor from selling it: *Id.*

Parol Title to Land, Evidence in support of—Possession, when Notice to Lien-Creditors and subsequent Purchasers.—The owner of a lot of land, sold a part of it by parol to a borough corporation in 1841, received the

purchase-money, delivered possession, and the same year the borough erected a fire-engine house thereon; no deed was executed by the grantor and his wife until December 1842; before this, on the 6th September 1842, a judgment was entered against the grantor, upon which execution issued, and the whole lot, including the portion bought by the borough, was sold by the sheriff to the plaintiff in the judgment, who brought ejectment and sought upon the trial to restrict the corporation from giving evidence of title prior to their deed. *Held*, that the defendants could show the commencement of their title under the parol purchase, from the date of their possession, which was in itself notice of their title, when brought to the knowledge of the plaintiff: *Patton vs. The Borough of Hollidaysburg*.

Though the deed of record is of later date than the purchase, it is not an inconsistent title with that shown by the parol contract accompanied with possession in the grantees; it was evidence of the consummation of the sale, and, as though it were the perfecting act of a written agreement of sale, the grantee can show the commencement of his title from the date of his possession: *Id*.

The corporation defendant was not estopped as against the plaintiff from showing an earlier inceptive title than the deed, for the plaintiff had undisputed notice of possession in the borough from the time it was taken; therefore he was not misled by the deed, and hence is not in the position to claim the exclusion of the truth, which is the effect of an estoppel, lest it might injure him. Having notice or the means of notice, that the defendant's title was complete in equity before the entry of his judgment against the grantor, he cannot claim to have been misled by the deed: *Id*.

Mortgage in Trust for Married Woman's Separate Estate, not extinguished by Conveyance to her of the Property mortgaged without Consent of her Trustee; nor by a Transfer as Collateral Security for Precedent Debt of Husband without her Consent.—A. being largely indebted to his wife for moneys received out of her separate estate, gave a mortgage on his own real estate for the balance then due, to a trustee in trust for her. Three days after, he gave a judgment to his partner B. to secure him. Afterwards A. and wife conveyed the mortgaged premises for a certain sum, subject to the mortgage in express terms to C., who soon after reconveyed to the wife on the same terms. The wife then joined with her husband in a mortgage to H., to secure him for money loaned to the husband. At the same time H. procured an assignment of the wife's mortgage from her trustee as collateral, and also a release from B. of the

priority of his lien. The real estate was then sold under the trustee's mortgage, and the proceeds were ruled into court and claimed by the wife, on the ground that the mortgage in trust for her still subsisted. *Held*,

That the conveyance of the mortgaged premises to the wife did not extinguish the mortgage held in trust for her, because her trustee was not a party to it, the intent to keep the mortgage alive appeared upon the face of the conveyance, it was for her interest in order to prevent subsequent liens from coming in before her, and because all parties acted upon the idea, and treated the mortgage as if it was subsisting: *Hatz's Appeal*

That the mortgage to H. executed by A. and wife was of their estate, subject to the trust mortgage in her favor, and that the assignment by the trustee to H., as collateral security for a precedent debt of the husband's, without the assent of the *cestui que trust*, did not pass any interest in that mortgage to the assignee: *Id.*

That though the wife, one of the mortgagors, was in equity the owner of the first mortgage, the subsequent mortgage by herself and husband to H., after she became the owner of the land, would not postpone in his favor the lien of the trustee's mortgage, nor estop her from claiming the money in satisfaction of that lien; else more force would be given to her acts by indirection than the law would give, if done directly to that end, for without the assent and co-operation of the trustee, she could not transfer nor release it; nor if there were no trustee, could she do this, without the joinder of her husband: *Id.*

Though equity will sometimes give effect to acts not in themselves binding obligations at law, yet it does so only to reach those who ought to be made responsible, or who are liable in person or estate to pay a debt. It will not give relief to a creditor out of the separate estate of the wife, where the debt was not hers, but that of the husband; and where her estate only, subject to the lien of the mortgage held by her trustee, was pledged, the pledgee cannot require her to make good his mortgage out of the proceeds of the sale of the property, belonging to her trustee under the mortgage in her favor: *Id.*

Where the wife was not the debtor, nor personally bound as surety in the mortgage executed by herself and husband to his creditor, her interest in the trust mortgage could not be postponed to his claim against them on the second mortgage; and since she had not parted in law or equity with the mortgage held in trust for her, it was entitled as the first mortgage to be paid in preference to any subsequent liens: *Id.*

SUPREME COURT OF NEW YORK.¹

Municipal Corporations—Power over Streets and Sidewalks—Liability for injuries caused by defects in Sidewalks.—There is a distinction between the power of municipal corporations over the carriage ways of their streets, and that which they possess over sidewalks: *Hart and Wife vs. City of Brooklyn*.

The absolute authority over the roadway, conferred upon the Common Council by the charter of the city of Brooklyn, is not possessed by them over the sidewalks; and the same responsibility cannot be imposed, for the condition of the sidewalks, as for that of the roadway: *Id.*

A municipal corporation is not liable in damages, to an individual, for injuries caused by an opening in a sidewalk, made by an owner of the soil or the adjacent land, without proof of notice of the insufficiency or defect, and neglect to cause it to be remedied: *Id.*

The public authorities are not to be presumed to have notice of a latent defect in the covering of an opening in the sidewalk, which was not made by them or under their direction: *Id.*

Notice to the public authorities of defects or obstructions in the streets, not occasioned by their own acts, must be express, or the defects must be so notorious as to be evident to all who have occasion to pass the place or to observe the premises: *Id.*

Action for Personal Injuries—Negligence of the Plaintiff.—No matter how gross or evident may be the negligence of the driver of a vehicle, if another by his own negligence exposes himself to injury from the vehicle, he has no remedy: *Mangam vs. Brooklyn City Railroad Company*.

Knowingly to allow a child of less than four years of age to go at large on a public street without a protector, is such negligence in his parents or guardians as will, if unexplained, prevent a recovery by him for a personal injury: *Id.*

Although want of care cannot be imputed to a child, for not avoiding a moving vehicle, it may be charged upon those who have the care of the child if they suffer him to go unprotected where vehicles are passing, where care and forethought must be required, beyond what he is capable of exercising: *Id.*

The child has parents living, and he is under their charge and

¹ From the Hon. O. L. Barbour, Reporter of the Court.

protection, he is responsible for their acts and omissions, as if they were his own; and for the purposes of an action by him for personal injuries, their negligence must be regarded as his negligence: *Id.*

Jurisdiction—Costs.—A court possesses power and jurisdiction to determine whether it has authority to entertain a particular controversy, although its decision and the law be, that it has no such authority, and it therefore dismisses the writ. Such a question may be presented by demurrer, and its decision must be a judgment: *King vs. Poole.*

Accordingly, where A. brought an action against B. in the county court, and B. demurred on the ground that the court had no jurisdiction of the subject-matter, and the court rendered a decision sustaining the demurrer: *Held*, that the court had power to enter a judgment dismissing the complaint or writ, and awarding costs to the defendant: *Id.*

Costs are a proper and necessary incident of such a judgment, and the court can no more deny them to a defendant who succeeds in establishing upon an issue of law, that the court has not jurisdiction, than to a plaintiff who has shown that it has: *Id.*

Assignability of Cause of Action—Principal and Agent.—A cause of action for the conversion by the defendant of funds intrusted to him as an agent, for which he has not accounted to his principal, is assignable: *Gould vs. Gould.*

Where an agent has duties to perform towards his principal, in the nature of a trust, he falls within the suspected relation, and the law indulges the presumption of fraud against a release procured by him from his principal, although no fraud is visible to the eye of the court: *Id.*

One cannot act for himself as vendor, and as agent for another as purchaser, in transferring securities: *Id.*

Vendor and Purchaser of Chattels; Rescinding Sale.—A vendor who has sold goods and drawn bills upon the purchaser for the price, can rescind the sale and sue for the value of the goods, if he has good cause for doing so, notwithstanding the bills, at the time of commencing the action, are out of his possession, so that he cannot then surrender them. If he produces the paper at the trial, and then offers to surrender it or cancel the acceptances, that is sufficient: *Fraschieris vs. Henriques.*

Partnership; Note by Firm to a Partner—Action thereon by Indorser.—Where a promissory note, made by a partnership firm to one of its
b.

members, for money advanced by him to the firm, is indorsed by the payee to another after maturity, the holder may maintain an action thereon against the makers: *Sherwood vs. Barton*.

Bonds issued by Railroad Companies payable in Blank; Action by Assignee.—Where a bond for the payment of money is issued by a railroad company, payable to ——— or assigns, any lawful holder by delivery or transfer may insert his own name in the blank as the payee, and maintain an action thereon: *Hubbard vs. New York and Harlem Railroad Company*.

Principal and Agent.—The plaintiff and defendant being owners of adjoining lots, the latter built a wall upon his lot along the boundary-line between them, the same being constructed for him by D. & C., under a written contract. The defendant furnished the materials only, but employed no workmen and exercised no control over them: *Held*, that he was not liable to the plaintiff for damages caused by the blowing down of the wall before it was completed; the relation of master and servant, or principal and agent, not existing between the defendant and those by whom the wall was constructed: *Benedict vs. Martin*.

Assignment for the Benefit of Creditors—Estoppel.—A provision in an assignment for the benefit of creditors, directing the payment of a fictitious demand to the assignor's wife, renders the assignment void, as intended to hinder and delay creditors: *American Exchange Bank vs. Webb*.

Where a wife, thus provided for in an assignment executed by her husband, delivered a release of her dower in his real estate, upon condition that if the assignment should be held valid, she should receive the amount directed to be paid to her by the assignment, and if held invalid, that she should have her dower out of the proceeds, and the plaintiff, a creditor, assented to these terms, and to a sale of the property in accordance therewith: *Held*, that this did not amount to a ratification of the assignment by him, or estop him from attacking it as fraudulent and void, and having the same set aside: *Id.*

Discharge of Indorser; New Security; Extending Time of Payment.—The receipt of a bill or note having time to run, from the party primarily liable on a bill or note then overdue, will not operate to discharge an indorser on the bill or note so overdue, unless there is an agreement,

express or implied, that the new bill or draft shall be in payment of the former, or extending the time of payment in favor of some party who is liable thereon, prior to such indorser: *Taylor vs. Allen*.

If a new draft is taken by the holder of a protested note, as collateral to such note, this will not prevent him from enforcing payment of the note: *Id.*

And if there is some evidence that a draft was thus taken, the question should be submitted to the jury whether there was an agreement to extend the time of payment on the protested note, or whether the new was given and received as collateral to the old security: *Id.*

Assignment for the Benefit of Creditors.—A trust in an assignment to pay the legal and necessary expenses of the assignees, with a salary of \$2000 a year to each, if that did not exceed the allowance made by law to executors; and if it should exceed that amount, then at the rate so prescribed for executors, will not render the assignment illegal: *Ketellers vs. Wilson et al.*

A trust, requiring the assignees to pay all persons who had become bail or surety for the assignors, the amount of their payments or liabilities as such, is not illegal: *Id.*

Yet where the assignors gave a preference in favor of bail and sureties, for the declared object of effecting a delay of several years, by the operation of this clause, knowing that the clause would produce that effect, and with the intent of putting off creditors, and gaining time to compromise with them: *Held*, that the assignment was void as against such creditors. *Id.*

Dower; Provision by Will, when in Lieu of.—A testator, by his will, gave to his wife certain articles of personal property and one-third of the net income of all his real estate, after payment of all taxes, assessments, and interest due thereon, during her natural life. Upon her death the payments were to cease, and the said one-third of the net income was to go to the heirs. The provisions were not stated to be in lieu of dower. *Held*, that the widow was not put to her election: *Tobias vs. Ketchum*.

What is a Promissory Note?—An instrument by which the maker promises to pay to the order of another a specified sum, at the store of the former—or in goods, on demand, for value received, is a negotiable promissory note: *Hosstatter vs. Wilson*.

Assignment for Benefit of Creditors—Agreements between Debtor and Creditor.—Where creditors of an insolvent firm entered into an agreement with the latter, by which they covenanted that in case the debtors would execute an assignment of their property to S., preferring therein, as first class creditors, an amount not exceeding \$60,000, and preferring the covenantors to the amount of fifty cents on the dollar on their several claims, they would discharge the debtors from all liability for the balance of such claims; and such assignment was accordingly executed; *Held*, that the agreement and assignment were to be construed as constituting parts of one and the same transaction; and that the assignment was on its face fraudulent and void: *Spaulding vs. Strang et al.*

An insolvent debtor cannot do, by concealment, what he may not do openly. Hence, he cannot, by a secret bargain with a portion of his creditors, compel them to agree to his release on condition of his executing an assignment giving them preferences: *Id.*

Lex loci and Lex fori—Statute of Limitations.—The rule as to contracts is that the *lex loci contractus* governs, as to the nature, validity, construction, and effect of the contract, and the *lex fori* as to the remedy: *Gans et al. vs. Frank et al.*

The application of this rule will dispose of any defence arising upon a statute of limitations of a foreign state, where such statute only prohibits the bringing of an action after the time limited in such state. The statute has no effect out of the state, and is not violated by bringing an action in another state or country: *Id.*

Where the defendant passed through this state more than six years before the commencement of the action, but was only here temporarily, and all the defendants had resided in Pennsylvania since the cause of action accrued; *Held*, that the action was not barred by our statute of limitations: *Id.*

If a debtor comes into this state before process is served on him, and he then leaves the state to reside elsewhere, the statute is not a bar until, after deducting all the time of residing abroad, the debtor has been in this state for six years: *Id.*

Whether the absence is repeated, or is one continued absence, is immaterial. There must be full six years spent in this state to make our statute of limitations a bar: *Id.*

Principal and Agent.—Under ordinary circumstances, an authority

given by a partnership firm to its agent, to advance moneys for the purchase of notes or bills to be remitted to the firm, will not justify the agent in continuing to make such advances, after being notified of a change in the firm by the admission of new members. There must be a renewed authorization by the new firm: *Callanan vs. Van Vleck*.

But if the bills so purchased by the agent, after notice of the change in the firm, have been remitted to the firm, received and retained by the new members, and used and applied in their business, this will justify the agent in inferring that the authority previously given by the old firm was continued by the consent of the new one; and is sufficient to render the new firm liable for the amount of such advances: *Id.*

Banks; power and authority of Cashiers.—The cashier of a bank has no power to make a contract for the bank in his own name, unless the corporation has authorized him to do so on its behalf, and with the intention that it should be bound: *Bank of the State of New York vs. The Farmers' Branch of the State Bank of Ohio*.

Accordingly, where a cashier, though authorized to indorse, for the purpose of transmitting to other banks for collection, bills and notes deposited with his bank or discounted by it, had no special authority to affix his name, or that of the bank, for the purpose of making the corporation liable on a contract of indorsement, but in order to facilitate the collection of a bill he indorsed the same as follows: "Pay E. Ludlow, Cas., or order, P. S. Campbell, Cas.:" *Held*, that the bank was not made liable as indorser of the bill: *Id.*

Life Insurance.—One having an interest in the continuance of the life of another, as his creditor, may insure the life of the debtor, and the contract for that purpose will be valid: *Rawls vs. The American Life Insurance Company*.

The fact that the debt is due to the creditor as a member of a partnership, and from another firm of which the person whose life is insured is a member, does not alter the rule: *Id.*

If such a policy of insurance is valid in its inception, the circumstance that the statute of limitations had run against the debt, before the occurrence of the death, will not affect it: *Id.*

It is not necessary that the party holding a policy on the life of another should have an insurable interest in such life, at the time of the death, to make the policy valid, if it was valid in its inception: *Id.*

A life policy is not regarded as a mere contract of indemnity: *Id.*

The omission of a person whose life is insured to make any statement in respect to any particular habit, not called for by any general or specific question put to him, will not be such a concealment as to avoid the policy. It is sufficient if he answers truly all the questions put to him, without evasion or concealment: *Id.*

LEGAL MISCELLANY.

The recent decision, in the Exchequer Chamber, of the case of *Webb vs. Bird*, 8 Jur. N. S. 621, affirming the decision of the Court of Common Pleas, 10 C. B. N. S. 269, has presented one point in the law of easements in somewhat of a novel aspect. It appeared, in this case, that the plaintiff was the owner of a windmill, built in 1829, and that the owners of the mill had from that period, down to 1859, enjoyed, as of right, without interruption or molestation, the benefit of the current of air from the west for working his mill. In that year and 1860, the defendant built a school-house within twenty-five yards of the plaintiff's mill, and thereby obstructed the plaintiff's mill, by hindering the currents of air which would otherwise have come to it from the west, whereby the value and use of the mill had become materially deteriorated.

The early reports contain some dicta in regard to the right of the owner of a windmill to enjoy the free and unobstructed access of the air to his mill. In 16 Vin. Ab. *Nuisance*, G. pl. 19, WINCH, J., is reported to have said, "That where one erected a house so high that the wind was stopped from the windmill in Finsbury Fields, it was adjudged that the house should be broken down." The same principle is declared in 2 Roll. Ab. 704. See also *Goodman vs. Gore*, Godb. 189.

In the case of *Webb vs. Bird*, in the Common Bench, WILLES, J., took a distinction between mills where the lord of the manor may compel all the residents within the manor to grind at his mill, and ordinary mills, where no such prescriptive right exists, and argued

that the early cases in regard to windmills might be explainable on some such grounds. The Exchequer Chamber did not regard these old cases as being of much authority in regard to the question before them, being very briefly reported and amounting to little more than dicta.

That court held, that the time of prescriptive right not existing in the case, and no presumption of grant arising, inasmuch as such presumption could only arise from long-continued enjoyment, where the person against whom the claim is asserted might have interposed to prevent or hinder the exercise of the right claimed, which, it would be idle to pretend, could have been done in any case like the present, without resort to such expensive complications as to bring in question the entire sanity of the person resorting to any such expedients, for any such purpose, it could not be fairly said the plaintiffs had acquired any such interest in the currents of air, as to maintain an action for their obstruction. *Moore vs. Rawson*, 3 B. & Cr. 332, 339; *Chasemore vs. Richards*, 7 Ho. Lds. Cas. 349, 370.

The decision of the English courts, in regard to this novel question, is highly commended in a leading article in the *London Jurist*, August 9, 1862, for its consonance with good sense and sound judgment. We should certainly not feel disposed to dissent from this comment, and we will add that, in our judgment, the law of England, in regard to presumptive rights growing out of uninterrupted use, has been very imperfectly comprehended, and very poorly set forth in many of the decisions and much of the judicial and juridical commentary, produced upon this side of the Atlantic. As we have here no strictly prescriptive rights, and very little upon which to base any presumption of grant, in regard to merely incorporeal interests, it is not wonderful that we should meet some indefiniteness of application in regard to questions involved in such inquiries. We have, therefore, presented this brief outline of the decision of *Webb vs. Bird*, inasmuch as it tends very clearly to illustrate the true basis of all presumption of grant growing out of mere use, without obstruction or contradiction, viz., the acquiescence of the adversary in such use.

I. F. R.

NOTICES OF NEW BOOKS.

DIGEST OF FIRE INSURANCE DECISIONS IN THE COURTS OF GREAT BRITAIN AND NORTH AMERICA. By H. A. LITTLETON and J. S. BLATCHLEY. Dubuque, 1862.

This is a very useful and well prepared work of its kind. It includes abstracts, it is stated, of all the reported decisions on the subject in this country, in England, and the British Provinces. It also contains a number of valuable manuscript cases. The authorities are carefully and accurately digested, so far as we can judge from the examination which we have made. The titles or subdivisions are, on the whole, well chosen for practical purposes; though if the work had been intended for professional readers alone, a more logical analysis would have been required. Any apparent defects in this respect, however, are substantially corrected by the index, and by subreferences between the different titles. We can, therefore, very willingly recommend the book, which occupies quite a new ground, to our subscribers.

While, however, we acknowledge its merits, we must regret that the time and care bestowed upon this volume had not rather been employed in the preparation of a regular treatise on the subject, which is very much needed. We confess to a great prejudice against digests, at least for general use. They are all very well in a lawyer's library, to economise, though not to dispense with, his own time and labor. But for any other purpose they are blind guides. Especially are they dangerous to those semi-professional persons who, like insurance agents and officers of insurance companies, have frequent need for legal instruction on points connected with their business. Such persons are more apt to be misled than enlightened by isolated abstracts of decisions. Even a well trained lawyer would risk much, if he attempted to acquire his knowledge of a special subject from such a source. Indeed, a thorough acquaintance with the principles of law, not merely on the special subject but on all cognate subjects, is necessary to enable any one to understand and apply correctly decided cases, even when reported at length with the *ratio decidendi* set out in full. No more false or hurtful notion exists in the public mind than that which supposes legal science to consist in congeries of precedents. These are only its accidents; its essential force lies above and beyond them. It would be as reasonable to suppose that a knowledge of medicine could be picked up from a collection of clinical cases, as that

a knowledge of law could be picked up from a collection of legal decisions.

We do not mean, as we have already said, to detract, by these observations, from the value of Messrs. Littleton & Blatchley's work. It has its proper place, which it will worthily fill. We only wish to enter our protest, as we have always done before, against the use of books of this character by those who have not had any regular legal education. It is a constant incentive to litigation; for it adds the disputes of *sciologists* to the controversies of the learned. It is far better for business men, if they wish to become their own lawyers, to be guided by their unaided common sense, which will, in most cases, bring them out right, than to attempt to reason from law books, which will, in most cases, lead them astray.

H. W.

REPORTS OF CASES IN LAW AND EQUITY, DETERMINED IN THE SUPREME COURT OF THE STATE OF IOWA. By THOS. F. WITHROW, Reporter. Vol. IV., being Vol. XII. of the Series. Des Moines: Mills, Brothers. 1862.

We have here the fourth volume of Mr. Withrow's Reports. In our judgment it is great praise, and well deserved by Mr. W., and, we are sorry to say, not always by others, that every page of his reports bears testimony to his laborious and faithful devotion to the work committed to his care, in preparing for publication the decisions of the highest judicial tribunal of a sovereign state. It is a trust of no small significance, and one which is not only to affect the present, but all future dwellers within its dominions. And any man not fully impressed with the grave responsibility of the charge, is certainly not fitted to undertake or to discharge it.

It is painful to see how much of the law-book making of the country is disfigured, not to say disgraced, by the *penny* saving and *labor* saving, not to the reader, but to the writer, everywhere apparent upon it. The love of ease, and the love of money, seem to have eaten out the life and the heart of this great empire; and law books, even, have, in too many instances, become a sham and a shadow in everything but the price. There is certainly quite too much of this apparent in by far the largest proportion of our state reports. From any suspicion of this fault, not to say crime, we are glad to be able to fully acquit Mr. Withrow.

It is saying all we need say in praise of this volume, that it fully sustains the established credit of its predecessors.

I. F. B.

THE

AMERICAN LAW REGISTER.

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THE HOMESTEAD EXEMPTION.

Owing to the continued and augmenting pressure of the financial revulsion which commenced in the year 1857, questions relating to **HOMESTEAD EXEMPTIONS** are constantly arising in the courts of those states where laws of this character exist. Many of these questions are equally novel, important and difficult. Statutes exempting Homesteads from judicial sale now exist in perhaps a majority of the states.¹ In a number of the states such exemption has been made the subject of express Constitutional provision.² The main *object* of the laws, whether statutory or constitutional, is in all cases the same. The leading ideas and general features of various statutes are not substantially dissimilar. But the amount exempted, both as to *value* and *quantity*, the manner of arriving at and subjecting to sale the excess, with many other minor and subordinate details are not precisely alike in scarcely any two of the states. Many of the statutes are crude, defective and imper-

¹ Among others in Ohio, Illinois, New York, Wisconsin, Massachusetts, Texas, Maine, California, Michigan, New Hampshire, Iowa, Vermont, and, in a qualified manner, in Mississippi, Pennsylvania, Indiana and Louisiana.

² Texas, Wisconsin, Indiana and California.

fect,—a fact always noticed and frequently deprecated by judges whose perplexing duty it has been to construe and apply them. *Holden vs. Pinney*, 6 Cal. 235; *Helpenstein vs. Gore*, 3 Iowa 287; *Keyes vs. Hill*, 30 Verm. 767.

The decisions, as will presently be seen, even when made under statutes whose provisions were substantially the same, are more than usually inharmonious. This is attributable in part, doubtless, to the *novelty* of the questions presented, for in most of the states where such statutes now exist, the policy of exempting homesteads was not adopted until comparatively a recent date. It is also to be ascribed in part, no doubt, to the intricate character of many of the questions presented for adjudication; for in every department of the law there are and will ever continue to be questions so nearly poised that it is vain to expect an entire concurrence of professional or judicial opinion. While this is so, I am, after a pretty thorough examination of the various statutes and decisions, fully convinced that much of the conflict would have been avoided, if the courts had been more fully aware of the decisions of sister courts in other states.

Although the title—**HOMESTEAD**—had no place in the Reports until about ten years since, and none in the Digests until about six years ago, so many decisions have since been made, that I believe it to be practicable to classify them, and to deduce from them (in some instances not without uncertainty and doubt, to be sure,) many general principles. I am not aware that such a task has before, at least to any considerable extent, been attempted. I have aimed constantly to keep in view the influence and operation of special statutes and particular phraseology, and when the decisions have turned upon these, the circumstance has been carefully noted.

In all the statutes which have come under my observation, the *extent* of the ground of the homestead or the *value* is limited; sometimes there is a limitation in both of these respects. There is usually a restriction as to alienation; the husband, if married, being prohibited from selling or conveying the homestead, unless the wife concurs in and signs the conveyance. The substance in

these and other particulars of the Acts of some of the States is briefly given in the note.¹ With this before us we shall the better

¹ OHIO.—Act passed March 23, 1850. Exempts "from sale on any execution on any judgment or decree the family homestead of each head of a family to the extent of \$500 in value." (§ 1.) Provides for homestead rights in leased estates. (§ 5.) Mortgage executed by husband alone does not affect right of wife or family. (§ 9.) *Swan's St.* pp. 711, 712.

ILLINOIS.—Act passed February 11, 1851. R. St. p. 650. Exempts "from levy and forced sale under execution, the lot of ground and buildings thereon, occupied as a residence and owned by the debtor, being a householder and having a family, to the extent in value of \$1000." * * * "No release or waiver of such exemption shall be valid, unless in writing, subscribed by the householder and acknowledged like deeds," &c. (§ 1.)

NEW YORK.—Act passed April 10, 1850. R. St. 615. Substantially and almost literally like the Illinois statute above. The act requires the deed to the party, or the "Homestead Exemption Book," to show that the property is a homestead, to entitle it to exemption. The Illinois statute does not so require.

WISCONSIN.—The constitution requires the legislature to provide "wholesome laws, exempting a reasonable amount of property from seizure or sale" for future debts. "A homestead" not exceeding forty acres in the country, used for agricultural purposes, or not exceeding one-quarter of an acre in a town or city, "and the dwelling-house owned and occupied by any resident of the state, shall not be subject to forced sale on execution." § 23, R. St. pp. 785, 798. A deed or mortgage of the homestead "shall not be valid without the signature of the wife," &c. Afterwards the Act of May 17, 1858, provided that the owner might remove from, or sell or convey, the homestead, without making it liable. And that no judgment, in either *Federal* or state courts, shall be a lien on the homestead. No limit as to value of homestead.

MASSACHUSETTS.—Exempts "from attachment, levy on execution and sale for debts" the homestead, whether possessed by lease or otherwise, to the extent of \$800. Wife must join in any conveyance or release in the same manner as she joins in releasing dower. If the parties are interested partition may be had. (13 Gray 21; 2 Id. 383.)

INDIANA.—Similar constitutional provision to Wisconsin. The legislature under this have exempted (Act of February 17, 1852, R. St., vol. ii., p. 387) property to the amount of \$300. It may be real or personal, or both, at debtor's election. If real property, no "mortgage or sale is valid, unless acknowledged by the wife in due form of law." (9 Ind. 109.) Property to exempt from execution only in actions upon contracts. 9 Ind. 196.

PENNSYLVANIA.—*Quasi* homestead act. (Act of April 9, 1849, *Dunlop's Laws*, p. 1088.) While the act does not mention homestead, it exempts "from levy and sale property owned by or in possession of the debtor, to the extent of \$300;" and

appreciate the exact force and value of the decisions to be cited from those states.

the defendant may elect to retain the amount in *real estate*. [When he may elect, &c., 4 Harris 800; 6 Id. 807; 11 Id. 810. How waived. 12 Id. 426.]

TEXAS.—Constitution provides "that the homestead" (defining extent and value) "shall not be subject to forced sale for debts hereafter contracted." "Nor shall the owner, if a married man, alien the same, unless by the consent of his wife, in such manner as the legislature shall point out."

NEW HAMPSHIRE.—Act of July 4, 1851, exempts "the family homestead of the head of each family to the value of \$500;" declares it "not to be assets while occupied by widow or any of the minor children," and that no release or waiver shall be valid, unless executed by husband and wife; if the wife be dead and there are minor children, the consent of the judge of probate must be had, &c.

MISSISSIPPI.—Act of 22d January, 1841, exempts to every white citizen, being the head of a family one hundred and sixty *acres of land*. Laws, 1841, p. 113. Nor is such land assets for the payment of debts. *Morrison vs. McDaniel*, 30 Miss. 213.

MICHIGAN.—Law provides "that a homestead not to exceed forty acres, or one lot in town not to exceed in value \$1500, and the dwelling-house thereon, &c., owned and occupied, shall not be subject to forced sale on execution." Act of 23 March, 1848, and New Const. art. XVI. § 1.

No mortgage or alienation is valid without the signature of the wife.

MAINE.—Exempts (Act 1850) lands and buildings not exceeding \$500 in value. Must file certificate with register of deeds in order to claim the exemption.

IOWA.—Code of 1851 exempts "from judicial sale the homestead of every head of a family. Widow or widower, though without children, deemed head of family, while continuing to occupy. A conveyance by owner, if married, is of no validity unless the husband and wife concur in and sign such conveyance."

It is made liable for taxes, mechanics' liens, and prior debts, and debts created prior to the acquisition of the homestead. "The homestead must embrace the house used as a home by the owner thereof." If he has two or more, he may select which he will retain as a homestead. Tracts of land "must be contiguous, unless they are habitually and in good faith used as part of the same homestead." No limit as to value, but only to extent. Failure to record in "Homestead Book" does not make it liable.

CALIFORNIA.—By section 15 of the constitution it is provided, that "the legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families."

The act of the legislature requires the homestead to consist of a certain quantity of land with the dwelling-house, &c., not exceeding in value \$6000.

LOUISIANA.—Act of March 17, 1852, entitled "An act to provide a homestead for the widow and children of deceased persons." The act gives to necessitous widows and children the preferred right to \$1000 out of the estate of the deceased.

The subject will be treated under the following arrangement:—

I.—OBJECT OF THE HOMESTEAD EXEMPTION, AND RULES OF CONSTRUCTION.

II.—LEGAL ATTRIBUTES OF A HOMESTEAD—NATURE AND EXTENT OF RIGHT.

III.—THE HOMESTEAD RIGHT—HOW PARTED WITH OR LOST:—

1. *By Voluntary Sale and Conveyance:*
2. *By Judicial Sale under Mortgage:*
3. *By total and absolute Abandonment.*

IV.—WHETHER A JUDGMENT IS A LIEN UPON THE HOMESTEAD.

V.—HOMESTEAD RIGHT SUBORDINATE TO VENDOR'S CLAIM FOR PURCHASE-MONEY, &c.

I.—OBJECT OF THE HOMESTEAD EXEMPTION AND RULES OF CONSTRUCTION.—The object of all rules or maxims of interpretation is to discover the true intent and meaning of a law or constitution. When the words are explicit and unambiguous they, of course, are to govern. If doubt exists recourse must be had to the occasion and necessity of the provision, the mischief felt, and the remedy had in view by the law-making power. When the intention thus collected is clearly ascertained it will be followed, though contrary to the letter of the statute. This principle finds an appropriate illustration in a case decided under a statute similar in character to those we are now discussing. Thus, where 'the act exempted "all sheep to the number of ten with *their* fleeces," &c.,

VERMONT.—Act declares that "if any head of a family shall decease, leaving a widow, his homestead, to the value of \$500, shall wholly pass to his widow and children without being subject to the payment of the debts of the deceased, unless specially chargeable thereon," &c. (§ 4.)

Exempts homestead and yearly products in favor of the housekeeper or head of a family.

Shall not be alienated or encumbered, except by the joint deed of the husband and wife, executed and acknowledged by her, the same as if it was real estate to which she holds the title.

GEORGIA.—Acts of 1841 and 1848, exempt fifty acres of land to each white citizen of the state, and five additional acres for each child under the age of fifteen. Both husband and wife must join in conveying. Act does not protect property from judgments founded on torts. *Davis vs. Hensen*, 29 Geo. 343.

it was held that the intent was to secure to the family wool equal in amount to that grown on a given number of sheep, though the debtor should not be the *owner* of the sheep. *Hall vs. Penney*, 11 Wend. 44. So where the statute exempted "one cow and one *swine*," the question was made that after the animal was slaughtered and packed away for use it was no longer a *swine*, and, therefore, not exempt. But the Supreme Court of Massachusetts very properly held otherwise, observing that "the statute *intended* the sustenance of a poor family," and is to be sensibly construed in view of the objects aimed at. *Gibson vs. Jenney*, 15 Mass. 205; *Simonds vs. Powers*, 28 Verm. 355; *Johnson vs. Richardson*, 33 Miss. 465.

The statement of this elementary principle of construction, and these illustrations of its application, sufficiently show the importance, in the construction and application of homestead laws, of keeping in constant view the object and design of the legislature in their enactment.

The homestead policy has been characterized by the courts as "beneficent," (4 Cal. 23, 26,) "liberal, wise, and benevolent," (1 Iowa 441, 512,) "humane in its character," &c. (28 Verm. 674.) The leading object of the homestead exemption is, of course, to protect and preserve the *home*,—a home not for the husband alone, but for him and his wife and children. *Floyd vs. Mosier*, 1 Iowa 512; 6 Id. 30. "A place where they may live in society beyond the reach of financial misfortune and the demands of creditors." Per BALDWIN, J., in *Parsons vs. Livingston et al.*, 11 Iowa 106. *Beecher vs. Baldy*, 7 Mich. 506; *Robinson vs. Wiley*, 15 N. Y. 492. The beneficent provisions of the law are especially designed to guard the wife and children against the neglect, the misfortunes, and improvidence of the father and husband. *Cook vs. McChristian*, 4 Cal. 23, 26; *North vs. Shearn*, 15 Texas 176; *Wood vs. Wheeler*, 7 Id. 13, 20; *Keyes vs. Hill*, 30 Verm. 759. And the *children*, equally with the wife, are within the benefits designed to be conferred by the statute. *Lies vs. De Diablar*, 12 Cal. 327; *Dickson vs. Chorn*, 6 Iowa 80; *Norris vs. Moulton*, 34 N. H. 392; *Johnson vs. Rich-*

ardson, 33 Miss. 464; *Walters vs. The People*, 21 Ill. 178; *Vansant vs. Vanzant*, 23 Ill. 586.

The homestead policy has also a *political* bearing; and in this view it has a broader range and other objects than the mere security of the husband and children against want. "The design," says the Supreme Court of Texas, "is to protect citizens and families not simply from destitution, but to cherish those feelings of independence so essential to the maintenance of free institutions." *Franklin vs. Coffee*, 18 Texas 413. The same idea was years before expressed and enforced by one of the most sagacious and able of American statesman. Advocating, in 1829, in the United States Senate, the adoption of a general homestead policy, Colonel Benton said:—"Tenantry is unfavorable to freedom. It lays the foundation for separate orders in society, annihilates the love of country, and weakens the spirit of independence. The tenant has, in fact, no country, no hearth, no domestic altar, no household god. The freeholder, on the contrary, is the natural supporter of a free government; and it should be the policy of republics to multiply their freeholders, as it is the policy of monarchies to multiply tenants." (1 Thirty Years' View, pp. 108, 104.)

It is not to be doubted that a large proportion of our wonderful national growth and prosperity is directly attributable to the fact that so much of the land is owned in fee simple, and that the great mass of farmers cultivate it as owners and not as tenants. They have therefore happily been spared from knowing and feeling the deep and exhaustive meaning, the o'erfraught and painful significance of the words DISRESS and RENT.

There is some want of agreement among the authorities as to whether statutes of exemption should be *strictly* or *liberally* construed. By some courts it is considered that statutes of this character are not *remedial* in their nature, and being in derogation of the common law, are not entitled to a liberal construction. *Rus vs. Alter*, 5 Denio 119; *Allen vs. Cook*, 26 Barb. 374. But the prevailing opinion is that, in view of their benevolent and humane character, they are entitled to be liberally viewed by the courts.

Hoitt vs. Webb, 36 N. H. 166; *True vs. Morrill*, 28 Verm. 674; *Charless vs. Lamberson*, 1 Iowa 441. And are remedial in their nature: *Deere vs. Chapman*, 25 Ill. 610; *Richardson vs. Burwell*, 10 Met. 507; 22 Conn. 338; 21 Ill. 44; *Hill vs. Johnson*, 29 Penn. St. R. 363.

The question, however, whether they shall be liberally or rigidly interpreted is not of much practical importance. They should be *sensibly* construed, with a view to secure the object aimed at their enactment. *Gibson vs. Jenney*, 15 Mass. 205.

Indeed, "the current of authority at the present day," says Mr. Justice BRONSON, "is in favor of reading statutes according to the most natural and obvious import of the language, without resorting to subtle or forced constructions for the purpose either of limiting or extending their operation. Courts cannot correct what they may deem excesses or omissions in legislation." *Waller vs. Harris*, 20 Wend. 562. See, also, observations of REDFIELD, C. J., in *Howe vs. Adams*, 28 Verm. 543.

In connection with the foregoing, the further thought must be borne in mind, that the homestead exemption is created by, and is based wholly upon statute law, or constitutional provision. It hence results that the party claiming the right or privilege must accept of it, if at all, under just the qualifications and conditions, neither fewer or different, under which the law gives it. And whether he asserts this right as a plaintiff, or maintains it as a defendant, he must, by his pleadings and proof, bring his case within the provisions of the law.¹ *Helpenstein vs. Gore*, 3 Iowa 287; 1 Id. 441; *Beecher vs. Baldy*, 7 Mich. 501; *Walters vs. The People*, 18 Ill. 194; *Kitchell vs. Burgwin*, 21 Ill. 44. Or at least "within the spirit and equity of the act." Per BENNETT, J., in *True vs. Morrill*, 28 Verm. 674.

¹ Thus, where the statute gives a homestead, *provided* it does not exceed a specified value, if the property when reduced to the smallest quantity, such as the dwelling-house and appurtenances exceeds such value, it is not exempt. *Helpenstein vs. Gore*, *supra*. Cited and approved: *Beecher vs. Baldy*, 7 Mich. 500. And while it is competent for the legislature, in such case, to exempt something out of it, or in lieu of it, as an equivalent in value, it is a matter of legislation, and not of judicial discretion, to say what the equivalent shall be. Id.

Some of the statutes require the defendant to take certain steps to obtain the benefit of the exemption. When this is the case, the requirements of the statute must be pursued before levy, or at least before sale, or conveyance by the husband. *Manning vs. Dove*, 10 Rich. S. C. (Law) 395; *Frierson vs. Wesbery*, 11 Id. 353; *Slanker vs. Beardsly*, 9 Ohio St. 589; *Helpenstein vs. Gore*, 3 Iowa 292; *People vs. Plumsted*, 2 Mich. (Gibbs) 469; *Frost vs. Shaw*, 3 Ohio St. 270; *Clark vs. Potter*, 15 Gray 21; *Lawton vs. Bruce*, 39 Maine 484; *Pinkerton vs. Tumlin*, 22 Geo. 165; *Herschfeldt vs. George*, 6 Mich. 456; 7 Id. 510; *Line's Appeal*, 2 Grant's Cases 197. And the wife and children are, in such case, affected by the failure or default of the head of the family to do what the statute requires. *Davenport vs. Alston*, 14 Georgia 271; *Crow vs. Whitworth*, 20 Id. 38; *Tadlock vs. Eccles*, 20 Texas 782; *Brewer vs. Wall*, 23 Id. 589; *Getaler vs. Saroni*, 18 Ill. 518; *Simpson vs. Simpson*, 30 Ala. 225. When such is the requirement of the statute, there must be not only ownership and occupation, but a selection of the premises as a homestead. *People vs. Plumsted*, *supra*. See, also, *Beecher vs. Baldy*, 7 Mich. 508, 505. But such selection, unless the statute so requires, need not be in writing. Id. Nor need it be recorded if the law does not so provide. *Cook vs. McChristian*, 4 Cal. 23, 26; *Reynolds vs. Pixley*, 6 Cal. 165.

II.—LEGAL ATTRIBUTES OF A HOMESTEAD—NATURE AND EXTENT OF RIGHT.—A homestead is a house used as a home, together with the prescribed quantity of land on which the house is situated. The word *home* is to have its ordinary and usual signification. "*Stethe* or *sted* betokeneth," says Lord Coke, "properly the bank of a river, and in many places a place." Co. Litt. 4, 6. Homestead therefore means the home-place.¹ RICHARDSON, C. J., 7 N. H. 245; 39 Id. 483.

¹ The term "homestead" does not necessarily imply all those parcels of land which may adjoin. 7 N. H. 245. Nor does it apply to leased property, though it adjoins premises used as a homestead, when such leased property is occupied by tenants and was never occupied as a home by the owner. And property thus leased constitutes no part of the homestead even though the homestead proper

"The homestead is the dwelling-place of the family where they permanently reside." *Cook vs. McChristian*, 4 Cal. 26. In general it may be said that to constitute a homestead there must be *actual occupation* and *use* of the premises as a *home* by the *family*. The premises must be appropriated, dedicated or used for the purpose designated by the law, to wit: as a "*home*"—a place to abide and reside in—a place for the family. This use must be actual and not constructive. It may be laid down as a general rule that the premises do not become impressed with the legal character of a homestead until actual residence and occupation by the family as a home.¹ *Holden vs. Pinney*, 6 Cal. 235, 625; *Norris vs. Moulton*, 34 N. H. 392; *Benedict vs. Bunnell*, 7 Cal. 245; *Meyer vs. Claus*, 15 Texas 516; *Wisner vs. Farnham*, 2 Mich. 472; *Rix vs. McHenry*, 7 Cal. 89; *Charless vs. Lamberson*, 1 Iowa 435; *Rhodes vs. McCormick*, 4 Iowa 373; *Williams vs. Sweetland*, 10 Iowa 51; *Philleo vs. Smalley*, 23 Texas 498; *Horn vs. Tufts*, 39 N. H. 478,

does not equal the value allowed by statute. *Hoitt vs. Webb*, 39 N. H. 158; *Dow vs. Andrews*, 30 Verm. 678; *Walters vs. The People*, 18 Ill. 194; S. C. 21 Ill. 178, where it is held that the "occupancy" required by the statute may be by tenants. So held, also, in 23 Ill. 536.

1 It seems to be the opinion of the Supreme Court of Texas (but the point was not necessarily involved in the case) that a homestead exemption will attach by "*preparations to improve of such a character and to such an extent as to manifest beyond doubt the intention to complete the improvements, and reside upon the place as a home.*" *Franklin vs. Coffee*, 18 Texas 413; 20 Id. 11; 15 Id. 176.

But in Iowa the contrary has been expressly ruled. It is held that premises do not become a homestead *until actually occupied* by the owner *as a home*, and therefore if they should be levied on prior to such occupancy, and pending the making of improvements with a view to reside thereon, they would be liable. Constructive occupation by fencing and cultivating will not do. *Charless vs. Lamberson*, 1 Iowa 435. See, also, *Wisner vs. Farnham*, 2 Mich. 472. It is believed that the latter view is not only more correct as a question of construction, but sounder as a matter of policy.

Actual occupation, however, as a residence by the husband with his house-keeper, he awaiting the arrival of his wife and children from another state, has been held sufficient to impress the homestead character upon the premises. Hence, a conveyance by the husband *alone*, prior to the arrival of the wife and family, was adjudged to be void. *Williams vs. Sweetland*, 10 Iowa 51. But see *Holden vs. Pinney*, 6 Cal. 235, and other cases, *infra*.

483; *True vs. Morrill*, 28 Verm. 672; *Mithery vs. Walker*. 17 Texas 593, 582; *Prior vs. Stone*, 19 Texas 371; *Davis vs. Andrews*, 30 Verm. 678; *Earle vs. Earle*, 9 Texas 630; *Kitchell vs. Burgwin*, 21 Ill. 45; *Walters vs. The People*, 21 Id. 178.

Upon the principle that the homestead right does not become perfect until actual residence by the *family*, a mortgage, executed alone by a married man who was himself living upon the premises, but whose wife had never resided in the state, is valid, even though the premises become the home of both after the execution of the mortgage. *Holden vs. Pinney*, 6 Cal. 235, 630; *Meyer vs. Claus*, 15 Texas 516; *Keiffer vs. Barney*, 31 Ala. 192; *Allen vs. Manasse*, 4 Id. 554. But see *Williams vs. Sweatland*, *supra*.

So where a man's wife was absent for near two years in another state, on a visit, and during such absence the husband purchased and improved certain property with the *intention* of making it his home, and before the return of the wife executed a mortgage upon it, the property was holden not to be a homestead as against the mortgagee. *Rix vs. McHenry*, 7 Cal. 89; *S. P. Benedict vs. Burnell*, 7 Id. 245; *Wisner vs. Farnham*, 2 Mich. (Gibbs) 472.

It is the duty of the husband to furnish a home for the family. If after marriage he takes his wife to reside upon property that was his before the marriage, such property thereby becomes a homestead with all the incidents of a homestead. *Bevalk vs. Kraemer*, 8 Cal. 66. But a trustee cannot acquire on land held in trust a homestead right unincumbered by the trust. *Shepherd vs. White*, 11 Texas 346.

"A man's homestead must (*per* BELL, J., 23 Texas 502) be his place of residence; the place where he lives; where he usually sleeps and eats; where he surrounds himself with the ordinary insignia of a home, and where he may enjoy its immunities and privacy." S. P. 39 N. H. 488. It follows from the foregoing that a homestead necessarily includes the idea of a *house* which is the home of the family. *Franklin vs. Coffee*, 18 Texas 413; *Charles vs. Lamberson*, 1 Iowa 435.

Most of the statutes provide that the homestead shall consist of a certain quantity of *land*, with the dwelling-house thereon, &c

When such is the case a homestead right cannot be asserted where the party asserting it has *no* interest in the *land*, but only in the building. Title to the land, or a right to demand title, or an interest in the land, is essential. So held as against the wife, where the house was erected on land which the husband, after his second marriage, purchased in the name of his children by a previous marriage, but with funds owned by him prior to his marriage with the wife who set up the homestead claim. *Smith vs. Smith*, 12 Cal. 216; *Farmer vs. Simpson*, 6 Texas 303; *Beecher vs. Baldy*, 7 Mich. 501; *Shepherd vs. White*, *ubi supra*. Some of the statutes like that of Ohio expressly provide that a homestead may exist in estates less than freehold; *e. g.* leasehold estates. Aside from statutory provision to the contrary, no good reason is perceived why the homestead right should be limited to estates in fee simple. And where the statute exempts a homestead "*owned by the debtor*," it is held that a life estate or a lesser interest than absolute ownership is within the protection of the statute. *The statute protects any interest of the debtor which might be sold on execution*. This, doubtless, is the true test. *Deere vs. Chapman*, 25 Ill. 610; 33 Miss. 462. If the other requisites concur, the homestead right will attach, without express statutory provision to that effect, in favor of a lessee for years. *Peland vs. De Bevard*, Iowa Supreme Court, MS., June 1862.

Connected with the subject of the necessity, in general, of actual occupation, is the question how far the homestead premises must be *contiguous*. Where, as in Iowa and some other states this matter is regulated by statute, this of course governs. Aside from statutory requisition to that effect, contiguity is not absolutely essential. Thus, where the law declared that the homestead might consist of "any town or city lot or lots in value not to exceed \$2000," &c., it was held that lots in a town need not be adjacent, if *used* in good faith as *part of the home* for the convenience of the family. *Hancock vs. Morgan*, 17 Texas 582; *S. P. Prior vs. Stone*, 19 Texas 371. But a vacant lot, never used as part of the homestead, and wholly separated by a street from the residence of the owner, is not exempt. *Methery vs. Walker*, 17 Texas 593. Nor can a

separate piece of woodland from which wood was accustomed to be obtained, or a piece of land occupied only as a shop, be regarded as part of the homestead. *True vs. Morrill*, 28 Verm. 672; *Walters vs. The People*, 18 Ill. 194.¹

It is held in California that as soon as "a place, by the occupancy, in good faith, of the family, acquires the character of a homestead, the nature of the *estate becomes changed*. It is turned into a *sort of joint tenancy* with right of survivorship, at least between husband and wife, and this estate cannot be altered or destroyed, except by the concurrence of both in the manner provided by law." *Taylor vs. Hargous*, 4 Cal. 268; 6 Id. 71. On the other hand, and with much better reason, it is declared by C. J. REDFIELD, 28 Verm. 544, that the homestead interest "is not a *fixed, definite estate* in the land, capable of appraisal and separation to the creditor in the execution; but it is constantly liable to variation, and to be defeated altogether by matters not of record, or by deed, but resting altogether in oral evidence." The estate, the title, whether it be in the husband or the wife, is not changed or affected, but for the purpose of securing the homestead to the family, the power of separate alienation is taken away. The law makes no infringement upon the husband's or wife's right of property, except such as may be necessary to carry out and secure the object designed. *Stewart vs. Mackey*, 16 Texas 56; *Gunnison vs. Twitchell*, 38 N. H. 62; *Davis and Wife vs. Andrews*, 30 Verm. 678.

But on the death of the husband, if the right of homestead survives to the widow and family, the law will protect them in the enjoyment of such right, from unjust interference on the part of either the heirs at law, or general creditors. Thus the adult heirs, though not constituting part of the family, will not be permitted to eject the widow or make her pay rent, at least so long as she

¹ The statute provided that the exemption should consist of "the lot of ground and the buildings thereon, occupied as a residence," &c. It was held that the act contemplated but *one* piece of land, and that a tract of timber land, a mile distant, yet necessary for fuel, &c., for the farm was not part of the homestead. *Walters vs. The People*, *supra*; S. C. 21 Ill. 178.

resides on the property as her home. *Keyes vs. Hill*, 30 Verm. 759. See further as to nature and extent of widow's and minor's rights: *Green vs. Crow*, 17 Texas 180; *Gimble vs. Goode*, 13 La. An. R. 352, 378, 398; *Succession of Foulkes*, 12 Id. 537, 885; *Fletcher vs. State Bank*, 37 N. H. 369; *Norris vs. Moulton*, 34 N. H. 392; *Walters vs. The People, &c.*, 18 Ill. 194; S. C. 21 Ill. 178; 23 Ill. 586, where it is held that a divorced woman is entitled to the right, the husband being the guilty party. Where the right survives for the benefit of the wife and children, neither the homestead property, or the income thereof is assets or liable for the payment of the debts of the deceased. *In re, Estate of Tompkins*, 12 Cal. 114; *Wood and Wife vs. Wheeler*, 7 Texas 13; *Dickson vs. Chorn*, 6 Iowa 19, 32; 23 Texas 585; 17 Id. 135, 180.

Not only so, but the homestead right is favored by the courts, and will be protected even in the husband's lifetime, against all fraudulent schemes to defeat it. Therefore, if a deed to the homestead be delivered to the purchaser before the purchase-money is paid, and the purchase-money is attached in a suit brought by the real though not the ostensible purchaser, equity will cancel the deed so obtained.¹ *Still vs. Sanders*, 8 Cal. 281.

If other parties have an interest in the land, as tenants in common, or as joint tenants, can a right of homestead exist if accompanied with actual residence on the land as a home? The writer sees no good reason, in view of the object and design of the homestead policy, why this question should not be answered affirmatively. The few decisions, however, which have been made touching this point are not entirely accordant. In New Hampshire it has been determined that the conveyance of an undivided interest, if possession be not abandoned, does not waive the homestead right as to the part not conveyed. *Horn vs. Tufts*, 39 N. H. 478; *Stat. of Mass., supra*. In California a different conclusion

¹ As to fraud in acquisition of the homestead, see *North vs. Shearn*, 15 Texas 174; *Stone vs. Darnell*, 20 Id. 11; *Robinson vs. Willey*, 15 N. Y. 489; S. C. 19 Barb. 157; *Randall vs. Buffington*, 10 Cal. 491. See 5 Cal. 488. Fraudulent disposition of homestead. *Wood vs. Chambers*, 20 Texas 247; *Dickson vs. Chorn*, 6 Iowa 19, 31; *deals vs. Clark*, 13 Gray 18.

has been arrived at, under a statute not essentially dissimilar from that of New Hampshire. The act requires the homestead to consist of a certain quantity of land, with the dwelling-house, &c., not exceeding in value \$5000. Under this it was held that homesteads could not be carved out of, or exist in lands held in, joint tenancy, or tenancy in common. *Wolf vs. Fleischacker*, 5 Cal. 244; *Reynolds vs. Pixley*, 6 Id. 165. It was even held that there could be no homestead right in lands owned by the husband, his wife and child, as tenants in common. *Giblin vs. Jordan*, 6 Cal. 416. In *Kellersberger vs. Kopp*, 6 Cal. 563, the principle was pressed still further, and it was determined that an existing homestead right was *ipso facto* destroyed by the conveyance of an undivided portion, even though the grantors and grantee both continued to occupy as their respective homes different parts of the same building. The reason assigned for this holding (5 Cal. 244), to wit: that the statute has provided no mode of separation, and because a division and appraisal would put the other owners to trouble, is not satisfactory. If the homestead owner chooses to convey part of his home, why should he thereby forfeit his right to the remainder? Creditors could not justly complain, because they would be benefited rather than injured thereby. The question whether a homestead right can exist in lands held by tenants in common is now before the Supreme Court of Iowa in *Thorn vs. Thorn*, and is not yet decided. The decision will appear in 18 Iowa Reports.

In considering the nature of the homestead right, one or two other subjects of importance remain, which will be briefly alluded to. In *Gary vs. Eastabrook*, 6 Cal. 457, the question is suggested but not decided whether there can be a homestead right in buildings used for hotels, stores, &c. It is said by WRIGHT, C. J. (*arguendo*), in *Rhodes et al. vs. McCormick*, 4 Iowa 368, that the object of the law is to protect the *home* and preserve it for the family, and not shops, office-rooms, and hotels, which are *rented to and occupied by other persons*. It is not sufficient to constitute a homestead that its owner used the front room of the building for the sale of groceries, slept in the back room, and took his meals habitually at a hotel. *Philleo vs. Smalley*, 23 Texas 498.

Under a statute limiting the *extent* of ground, but not the *value* of the homestead, and which provides that the "homestead must embrace the house used as a home by the owner," it was determined (one judge dissenting) that a portion of a building used as a home by the owner was exempt, but otherwise as to the remainder of the building not thus used,—the presumption, however, being that the *whole* is exempt until the contrary is shown. *Rhodes et al. vs. McCormick*, 4 Iowa 368.¹ (STOCKTON, J., *dissentiente*.)

¹ The facts upon which this decision was made are thus given in DILLON's Iowa Digest, p. 503, § 3:—"The house, in this case, was a three story brick building, erected on a half lot in the city of Muscatine, and costing some \$8000. The 'cellar and first floor were designed by the owner (who was the head of a family and the defendant in execution) as a business house (a store); and the second and third floors as a family residence.' The second and third floors were occupied as a residence by the owner and his family, and by another person and his family, but had been previously rented in part for offices; the cellar and first floor were rented to and occupied by a tenant as a store: *Held*, that the cellar and first floor of the building were liable to be seized and sold on execution, and that the *cellar* and the *second* and *third* stories were exempt." 4 Iowa 368. The majority opinion in this case was delivered by a very able judge (WRIGHT, C. J.), and the grounds upon which it rests are very forcibly argued by him. It may not be improper to add, however, that the correctness of the conclusion arrived at has been seriously questioned by many members of the bar, not on the ground that the decision, abstractly considered, was not just, but for the reason that as the statute had not provided for such a *division* of the homestead, the court could not make it, and therefore that the *whole* building was exempt or *none*.

J. F. D.

DAVENPORT, IOWA.

(To be concluded in the next number.)

RECENT AMERICAN DECISIONS.

In the Supreme Court of the State of Wisconsin. May 15, 1862.

TODD vs. LYDIA A. AND FRANCIS C. LEE.

WRIGHT *et als.* vs. THE SAME.

JUFFRAYS vs. THE SAME.

TAYLOR *et al.* vs. THE SAME.

FARIES vs. THE SAME.

1. The contracts of a *feme covert*, when necessary or convenient to the proper use and enjoyment of her separate estate by virtue of the enabling statutes (secs. 1, 2, and 3, R. S. Wis. 1858¹), are binding upon the estate at law. (*Conway vs. Smith*, 18 Wis.)
 2. All her other engagements stand as before, good only in equity. (The case of *Yale vs. Dederer*, 22 N. Y. 450, considered and disapproved; s. c., 18 N. Y. 285, approved.)
 3. The change from an equitable to a legal estate, has not, with respect to her general engagements, enlarged her powers or removed the disability of coverture. but she remains as if still possessed of an estate in equity without restriction as to the *jus disponendi*, capable of charging it with debts incurred for her own benefit or the benefit of her estate, to its full extent, and such charge may be enforced in a civil action under the Code of Procedure.
- The action should be *in rem* not *in personam*, for she is incapable of charging herself *personally* either in equity or at law.

CHAPTER XCV.

OF THE RIGHTS OF MARRIED WOMEN.

- SECTION 1.** The real estate, and the rents, issues, and profits thereof, of any male now married, shall not be subject to the disposal of her husband, but shall her sole and separate property, as if she were a single female.
- SECTION 2.** The real and personal property of any female who may hereafter marry, and which she shall own at the time of marriage, and the rents, issues, and profits thereof, shall not be subject to the disposal of her husband, nor be liable his debts, and shall continue her sole and separate property.
- SECTION 3.** Any married female may receive by inheritance, or by gift, grant, rise, or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise real and personal property, and any interest or estate therein, and the rents, issues, and profits, in the same manner with like effect as if she were unmarried, and the same shall not be subject to disposal of her husband, nor be liable for his debts.

5. Injunctions and receivers in such actions may be had to preserve the property during the pendency of the suits, and to convert the property and satisfy the debts, for want of other process, after judgment.
6. The husband is a proper party, but no personal demand can be made against him in such cases. At common law the personalty of the wife rests absolutely in the husband, and although he may be liable for her debts upon the principles of agency, yet, even under the Code of Procedure, to bind him or his property, a separate action at law must be brought. This common law rule has no application in such cases in equity; and whether he is liable or not is a question of fact for the jury.¹
7. L., a *feme covert*, the owner of a separate estate under the enabling statute, with her husband's permission, upon the faith and credit of her separate estate, purchased goods and hired a store, and engaged in trade as if she were *sole*. She failed to pay for the rent, and refused to pay for the goods, because of coverture. In actions brought to charge the rent and price of the goods upon her separate estate, and to apply the goods left to liquidate the claims in suit, *Held*, That as it is an established rule in equity that a *feme covert* may, with her husband's permission, given even after marriage, become a *sole trader*, and hold the profits arising out of her business to her sole and separate use, so equity, in consideration of the benefit thus accruing to her separate property, will charge the debts properly incurred in trade upon it, and apply both her separate property and stock in trade to their payment, through a receiver.

These were actions under the Code of Procedure, brought to charge the married woman defendant's separate property, held under the enabling statute of 1850 (R. S. Wis. c. 95, secs. 1, 2, and 3), with the payment of debts incurred by her in separate trade, and to reach the capital invested in the business. They were commenced before the County Court for Milwaukee county; the first three entitled suits were removed to the Circuit Court for that county, where the orders granting injunctions and a receiver, which had been obtained in the County Court, to restrain the dissipation of the property and preserve it during the litigation, were vacated. From the orders dissolving the injunctions and vacating the order appointing the receiver, the plaintiffs appealed. The last two entitled suits were sent to the Circuit Court for Dane county, where, upon the hearing, they were dismissed, and judgments for costs given against the plaintiffs, from which they appealed.

¹ *Ozard vs. Seaton*, 39 Maine 119; *Id.* 126; *Burger vs. White*, 2 Bosw. Sup. Ct. 92.

The questions involved were nearly identical in all the cases, and are disposed of together.

By the Court. DIXON, C. J.—Before the case of *Yale vs. Dederer*, 22 N. Y. 450, it was well settled in New York, if, in fact, anything can ever be said to be settled in that state, that a married woman having a separate estate might bind it by her general engagements to pay debts contracted for the benefit of such estate, or on her own account, or for her benefit upon the credit of it. *Metho. Epis. Church vs. Jaques*, 3 Johns. Ch. 77; S. C., in Court of Errors, 17 Johns. 548; *North American Coal Co. vs. Dyett*, 7 Paige 9; S. C., in Court of Errors, 20 Wend. 570; *Gardner vs. Gardner*, 7 Paige 112; S. C., in Court of Errors, 22 Wend. 526; *Curtis vs. Engel*, 2 Sanf. Ch. 287; *Yale vs. Dederer*, 18 N. Y. 265.

In England a broader doctrine prevails. It has been decided that she may not only bind her separate property by a general engagement, written or parol, for her own benefit, or that of her estate (*Murray vs. Barlee*, 3 M. & K. 209; *Owens vs. Dickenson*, 1 Cr. & Ph. 48), but that she can do so by the execution of a bond as surety for her husband (2 Atk. 69; 1 Bro. C. C. 16): and for a stranger even (15 Vesey 596).

In Kentucky her separate estate has been charged with the payment of a note executed as surety for her son, and parol evidence of her declaration, made at the time of executing it, that she would not pay it, and her separate property should not go for that purpose, was excluded (7 B. Mon. 298).

The courts of New York, however, have held to a narrower rule, and she has been restricted within the limits above stated.

The rule given by SPENCER, C. J., 17 Johns., and COWEN, J., in 20 Wend., is indeed somewhat less stringent, and accords more nearly with the English decisions. SPENCER, C. J., says: "I am entirely satisfied that the established rule in equity is, that when a *feme covert*, having separate property, enters into an agreement, and sufficiently indicates her intention to affect by it her separate estate, when there is no fraud or unfair advantage taken of her, a

Court of Equity will apply it to the satisfaction of such engagement. Judge COWEN states it thus: "When her separate estate is completely distinct, and, as here, independent of her husband, she seems to be regarded in equity as respects her power to dispose of or charge it with debts, to all intents and purposes as a *feme sole*, except in so far as she may be expressly limited in her powers by the instrument under which she takes her interest."

"The *feme covert*," says Chancellor WALWORTH, in *North American Coal Co. vs. Dyett*, 7 Paige 9, "is as to her separate estate considered a *feme sole*, and may, in person or by her legally authorized agent, bind such separate estate with the payment of debts contracted for the benefit of that estate, or for her own benefit upon the credit of the separate estate." And again, in *Gardner vs. Gardner*: "So far as that estate is concerned, she is considered a *feme sole*; and the estate is answerable for money borrowed by her or her trustee for the benefit of such estate, although the husband is the lender."

In the same case, in 22 Wend., Judge COWEN uses these words: "If the wife holds an estate separate from and independent of her husband, as she may do in equity, chancery considers her in respect to her power over this estate a *feme sole*; and although she is still incapable of charging herself at law, and equally incapable in equity of charging herself personally with debts, yet I think the better opinion is, that separate debts, contracted by her expressly on her own account, shall in all cases be considered an appointment or appropriation for the benefit of the creditors as to so much of her separate estate as is sufficient to pay the debt, if she be not disabled to charge it by the terms of the donation." The Vice-Chancellor reports the rule in 2 Sandf. Ch., by saying that the complainants, "in order to sustain their suit, must show that the debt was contracted either *for the benefit of her separate estate, or for her own benefit upon the credit of the separate estate.*"

The rule as last laid down, is fully and explicitly sanctioned by the two judges delivering opinions in *Yale vs. Dederer*, 18 N. Y. The case there turned on the ground that the liability of a surety is *stricti juris*, and equity will not grant relief where there is no

obligation at law. *Mrs. Dederer* signed the note as surety for her husband. At law the note was void. She had executed no instrument creating a specific lien on her separate estate which would have been legally binding in case she had been a *feme sole*. In equity it was a mere general engagement, which could only be enforced upon principles of exact justice, and because it was against conscience for her to refuse payment. This element was entirely wanting. It was clearly not the case of a debt contracted on her own account, for her own benefit, or for the benefit of her estate. This is Judge COMSTOCK's position. Judge HARRIS's is substantially the same, though he treats it more as a question of evidence. He holds that the fact of her engaging generally in conjunction with her husband to pay money, is not sufficient evidence of an intention to charge her separate estate, that the presumption is the debt is that of the husband, and unless the contrary be shown the claim must be denied.

The contracts of a married woman, when necessary or convenient to the proper use and enjoyment of her separate estate, are binding at law. *Conway vs. Smith*, 13 Wis.

All her other engagements stand as before the passage of the statutes, good only in equity. The change from an equitable to a legal estate has not, with respect to them, enlarged her powers or removed the disability of coverture, but she remains as if still possessed of an estate in equity, without restriction as to the power of disposition. *Idem Wooster vs. Northrups*, 5 Wis. 245; *Yale vs. Dederer*, 18 N. Y. 265.

The debts in question belong to the latter class. Within all the authorities, the separate estate of a married woman will be charged in equity with the payment of debts contracted for her benefit. In this case we need not inquire further, for that the debts in question were beneficial to Mrs. Lee will readily appear. With her acknowledged consent and approbation of her husband, she engaged in business as a sole trader, the profits to be appropriated to her separate and exclusive use. She contracted these debts in the prosecution of that business. It is an established rule in such cases, that the earnings of a trade thus carried on will in equity

be deemed her separate property, and that she will be protected in its use as against her husband, though not his creditors. 2 Story's Eq. Juris., § 1387; 2 Roper on Husband and Wife (80 Law Lib.), 171-2; *Slanning vs. Style*, 8 P. Wms. 334; *Megrath vs. Robertson*, 1 Dess. 445; *Freeman vs. Orser*, 5 Duer 476; *Burger vs. White*, 2 Bosw. 92, 96, 99; 2 Ind. Eq. 553. See also *Gore vs. Knight*, 2 Vernon 535; *Gage vs. Lester*, 2 Bro. Cases Parl. 4. This is a sufficient consideration of benefit to charge her property with the payment of debts incurred in the business. If the agreement for a separate trade be by articles before marriage, without trustees, or if after, and founded upon a valuable consideration, the income and profits will be supported for her separate use against her husband and his creditors. But if after marriage he merely permit her to conduct business on her separate account, the earnings will be protected only as against him. Story's Eq., *supra*. In such cases a Court of Equity will make him a trustee for her separate use, and compel him to account to her or her creditors for the profits which may come to his hands. Roper on Husband and Wife, *supra*. But while the beneficial interests of the wife is thus recognised and enforced in equity, her condition at law is very different. There the profits as well as the capital employed are the husband's, there being no trustees, no obstacle to interfere between the rule of law which vests in him all the wife's personal property accruing to her during the marriage, and her equitable title to it as her separate estate under the permission of her husband. Roper, *supra*. And he is also, upon the ground of his presumed authority to her, bound by her transactions in the trade, and responsible for the debts. *Idem*. This answers many of the authorities cited by respondent's counsel, and shows them inapplicable. They were cases at law in which property thus employed was held liable to seizure and sale to satisfy the husband's debts. They prove nothing here; these are proceedings in equity to charge the separate estate, on the faith of which the credits were given; and if it is admitted that the goods when purchased might have been taken for *Mr. Lee's* debts, that does not

affect the decision. It was one of the hazards to be considered by *Mrs. Lee* before embarking in the enterprise.

The great length to which the common law goes in denying the separate rights of the wife, is illustrated by the following cases:—

The property in wearing apparel, bought for herself, by a wife living with her husband, out of money settled to her separate use before marriage, and paid to her by the trustees of the settlement, vests by law in the husband, and it is liable to be taken in execution for his debts. *Carne vs. Brice*, 7 M. & W. 188.

A husband and wife separated by agreement (not under seal), and at that time he agreed to allow her a certain sum weekly for her support, which was paid; and she saved a portion of her allowance and invested it in stock, and disposed of the proceeds by way of gift. *Held*, That the husband was entitled to recover back the money so given in an action for money lent against the person who received it. *Messenger vs. Clarke*, 5 Exchequer 388.

A married woman deposited with the defendant the savings of certain rents of leasehold property, which had on her marriage been conveyed by her, with the consent of her intended husband, to trustees, upon trust to pay or permit her to receive the rents, &c., to her sole and separate use. *Held*, That the trust being discharged on the rents coming to the wife's hands, the trustee ceased to have any interest in or control over them; and that, upon the wife's death, her husband was entitled to bring an action in his own right to recover the money so deposited. *Bird vs. Peagram*, 76 E. C. L. 638.

How far the introduction of legal instead of equitable estates, and the authority of the wife at law to hold and dispose of personal property which comes to her as separate estate, may be considered *in equity* as having relaxed this strict rule of the common law, so as to enable that Court to protect her against the demands of the husband's creditors in cases like these, where her separate legal estate is absorbed in the trade, or whether they have affected it at all, need not here be examined. No claim on the part of *Mr. Lee's* creditors (if there be any) has been interposed, and it is now too late for them to proceed. Nor need we inquire now far equity

would interfere in behalf of her creditors against his, since the former by superior diligence have acquired actual precedence. The moral force of a rule which would assist them to the products of a business, built up by their indulgence, would appear to be almost irresistible.

Neither are we to investigate *Mr. Lee's* personal liability. No demand for personal judgment is made against him. Nor does it seem there could be. As a trustee in equity, he is a proper party, but his personal liability, whatever it is, is legal, and must be enforced at law. The husband is liable upon the contracts of the wife only upon the principles of agency—that he has authorized her either expressly or by implication to bind him—the general rule being that she has no such power (1 Macqueen on Husband and Wife 131 (57 Law Lib. 93); *Freestone vs. Butcher*, 9 C. & P. 643 (38 E. C. L. 269); *Lane vs. Ironmonger*, 13 M. & W. 368); and whether she was authorized or not is a question of fact for the jury. *Idem*. In determining it, many circumstances are to be considered, as whether the contracts are extravagant (*Lane vs. Ironmonger, supra*), whether the husband having control of the goods does not cause them to be returned (*Waithorn vs. Wakefield*, 1 Cowp. 120), and whether the credit was not given solely to the wife, when it is said the husband will in no case be liable. *Freestone vs. Butcher, supra*; *Bentley vs. Griffin*, 5 Taunt. 356; 1 E. C. L. 131; *Metcalf vs. Shaw*, 3 Camp. 22. Mr. Roper thinks that whenever the wife is to be considered as acting as a *feme sole*, and entitled to the profits of her separate trade, as her sole and separate estate, the husband will not be liable, *in equity*, to her engagements contracted in it; that the creditor cannot complain, since he trusted to *her* credit only, and it would be unjust to subject him to her debts, when he is not entitled to any of the profits; and that a Court of equity will interfere to prevent the prosecution of the legal right, and at the same time subject the funds in the trade to the demands of her creditors. 2 Roper 174. But these positions are doubted by Mr. Jacob and Mr. Bright (2 Bright's Husband and Wife 301), and seem never to have been adjudicated.

The issuing of the injunctions and appointment of the receiver in these cases, was under the circumstances undoubtedly correct. They take the place of the process of attachment when necessary and proper at law. Such was the practice under the former system in equity, when there were no trustees of the separate estate, and the fund was in danger of being wasted or put beyond the reach of creditors. It was the course pursued in *Lilia vs. Airey*, 1 Vesey 277, and in *Meth. Epis. Church vs. Jaques*, 1 Johns. Ch. 450. And instances of an injunction where there were trustees are very numerous.

It follows from these views that orders dissolving the injunctions, and vacating the orders appointing a receiver in the first three entitled cases, and the judgments in the last two, must be reversed, and that all must be remanded for further proceedings according to law.

Orders and judgments reversed, and cases remanded.

We have, reluctantly, felt compelled to omit that portion of the opinion of Mr. Ch. J. DIXON, in which he gives a very elaborate and thorough review of the opinion of the New York Court of Appeals, in *Yale vs. Dederer*, 22 N. Y. R. 450. This we have done on account of the very great length to which the opinion would otherwise have extended. That portion of the opinion, forming more than one-half of the whole, not being essential to the authority of the case, although of marked interest and ability, we have therefore omitted.

After so thorough a review of the cases and so exhaustive a discussion of the principles of equity, involved in the question decided by this case, we should not feel justified in occupying much more space in regard to them. But some few cases have been decided, later than the published Reports, at the date of the opinion in that case, to which it may be of interest to refer. We have, through the courtesy of the reporter, been per-

mitted to see the opinion of the Court, in the case of *Willard vs. Eastham*, 15 Gray, soon to be published, wherein the S. J. Court of Massachusetts held that the promissory note of a married woman (having separate estate), given by way of accommodation, as surety for another, not her husband, will not bind her separate estate, either the corpus of the property or the rents, issues, and profits, unless there is distinct evidence, from the contract itself, that such was her intention, or that the contract was upon the credit of such estate. The Court here thus state the English law: "The result of the English decisions would therefore seem to be, that the separate estate of a married woman is answerable, for all her debts and engagements, to the full extent to which it is subject to her own disposal." And this seems to us to be a very accurate statement, in all respects, so far as that point is concerned. For, upon examination of the English cases upon this question,

and they are quite numerous, it will be perceived, that a large number of them turn upon the point, how far the property was under the *disposal* of the feme covert.

The leading American case of *The Methodist Episcopal Church vs. Jaques*, 8 Johns. Ch. R. 77-121, where Chancellor KENT occupied so much space in reviewing and criticising the English cases, turns entirely upon the point, whether, by the deed of settlement, the married woman had the power to charge her separate estate, by all her engagements, in whatever form. And all the discussion in the English cases upon the question how far the contract is a good execution of the power of the wife over her separate property, according to the fair construction of the terms of the settlement, turns upon the same point: which we shall see is finally abandoned by the English Courts as untenable.

This question has been made the turning point in a very large proportion of the English cases. For the relatives and friends of married women, in attempting to make provision for their support, independently of the husband's resources, after the Equity Courts had determined that they had the same general power over their separate property, as *femes sole*, found it indispensable, in order to relieve wives from the power and importunity of husbands, to fetter the disposition of the wife's property with every clog and embarrassment, which would still leave it available for their own maintenance. Such a clause is often inserted to prevent the wife anticipating, or alienating, the income of her separate property. This was said to have been first done by the advice of Lord THURLOW, who was one of the trustees, in the case of *Miss Walton*. See *Pybus vs. Smith*, 3 Br. C. C. 847; *Parkes vs. White*, 11 Vesey 221; *Jackson vs. Hebhouse*, 2 Mer. R. 487;

Lord COTTENHAM, Chancellor, in *Rennie vs. Ritchie*, 12 C. & F. 234. We are not aware that any well considered case has ever attempted to evade any restrictions upon alienation inserted in the deed of settlement. It is certain no such course of decision could be justified. It is clear, however, that this point is not the one upon which this case turns.

For it is obvious, that where Equity holds married women as having the same general power of disposing of their separate estate, as if they were *sole*, it is not easy to comprehend the ground upon which any distinction can be made, in principle, between debts evidenced by an express undertaking to charge the separate property, and those which are not; or between debts of suretyship and those where the consideration goes to the feme covert, or for the benefit of her separate estate, so far as her intention to charge her separate estate is concerned. If the promisor have no means of meeting an undertaking, except her separate estate, and could not bind herself personally, the conclusion seems irresistible, that if she contracts in good faith, she does intend to bind her separate property. It seems to us, therefore, that the American cases, among which we may name *Yale vs. Dederer*, 18 N. Y. Court of Appeals R. 265, 8 C. 22 Id. 450, *Willard vs. Eastham*, *supra*, and many others, referred to in 1 Lead. Cas. in Eq. 427, *Hare & Wallace's Am. Note*, which have held that the promissory note of a married woman, for the accommodation of one not her husband, will not, *prime facie*, bind her separate estate, in equity; but that such contract will so bind her separate estate, if it appear, as some of the cases hold, from the contract itself, and as others hold, either from the contract or *aliunde*, that such was her intention, at the time of entering into the contract, do not rest upon any satisfactory prin-

ciple. We can comprehend the import, and the reasonableness, of such a rule when it is made universal, as a restriction upon the power of married women in regard to the disposition of their separate estates. We would not dissent from a legislative restriction, prohibiting married women from binding themselves (as they are now allowed to do, personally, in many of the states, as to contracts generally), or their separate property, for any contract of suretyship. Such a restriction, as to the husband, would certainly be judicious. It may be questionable whether the Courts could, with much show of reason, now adopt such a rule, but the legislature might do it. But the American Courts, in attempting to discriminate between the presumption of intention to charge the separate estate, where the contract is one of suretyship, and where it is one for the benefit of the feme, or of her separate estate, and holding that such presumption will not arise from the contract itself, in the former case, but that it will, in the latter, seem to us, to have manifested more sense of justice and indulgence towards the interest of the feme, than of tenderness in regard to the implications affecting her good faith, growing out of the reasons which they urge for the distinction. For it seems to be difficult to raise any distinction in regard to her intention to charge her separate estate, which will not finally implicate her in positive bad faith towards the person with whom she was contracting.

And the Court, in *Willard vs. Eastham*, feeling the force of this implication doubtless, has placed the case upon the ground that a contract of suretyship, being, *prima facie*, neither for the benefit of the feme, or her estate, cannot be made a charge upon her separate estate, unless by her express contract. And

where the contract is in writing, this provision must form part of the writing, of course. This makes the decision more consistent with reason and with fact than those are, where a distinction is attempted to be made between the presumption of intention on her part in regard to charging her separate estate, when the contract is for her own benefit, or that of her estate, and when it is not.

It would be quite impossible to give any intelligible view of the American law upon this question, within any such limits as are allowed us here. It has seemed to us, that in those particulars in which the American Courts have departed from the rules of equity recognised in the English Courts, it has rather tended to make the law convenient and agreeable, than rational or consistent in itself.

1. The American Courts have required that in the deed or conveyance of the estate to the separate use of a married woman, it should expressly appear that she had power to charge the same by a given form of contract, in order to make such contract a charge upon such estate. *Ewing vs. Smith*, 8 Dessaus. 417; *Trustees of Frazier vs. Center*, 1 McCord's Ch. R. 270; *Magwood vs. Johnson*, 1 Hill C. R. 228; *Robinson vs. Ex'ors of Dart*, *Dudley's Eq.* 128; *Reid vs. Lamar*, 1 Strobb. Eq. R. 27.

In New York, Chancellor KENT condemned the English rule; *Meth. Episc. Ch. vs. Jaques*, *supra*; but his decision was reversed, 17 Johns. R. 548; and the New York Courts, through a long course of years, were understood to have recognised fully the English rule upon this point: That, where no restriction was placed upon the power of alienation, the Courts would not create any by implication. But that ground is certainly very essentially shaken in the opinion of Mr. Justice Selden, in *Yale vs. Dede-*

rer, 22 N. Y. Rep. 450. And the Courts in Pennsylvania seem to have adopted somewhat similar grounds. All this certainly shows very manifest dissatisfaction with the English rule, and an increasing disposition to protect the property of married women. And as married women have no power, by the common law, to make a contract personally binding, and it is only through the aid of Courts of Equity that such contracts can be made a charge upon their separate estate, it is to be expected that those Courts would affix such conditions to the relief granted, as they deemed requisite for the protection of the rights of those who are under their protection, in some sense. We only regret that there should be so much conflict between the English and American cases upon this point, when there seems so slight ground for departing from the English rule, as at present held.

2. This whole idea of regarding the estate of the wife in her separate property, as in the nature of a trust for her support, and that she can only charge it by virtue of a power given her for that purpose, which has led to so much discussion and confusion, both in England and this country, is a mere fiction, and as such has been formally and entirely abandoned in England within the last year. *Johnson vs. Gallagher*, 7 London Jur. N. S. 278 (March 1861). Lord Justice TURNER there said, "The doctrine of appointment, however, seems to me to be exploded by *Owens vs. Dickinson*, 1 Cr. & Ph. 48. A Court of Equity having created the separate estate, has enabled a married woman to contract debts in respect of it. Her person cannot be made liable either at law or in equity, but in equity her property may. This Court, therefore, as I conceive, gives execution against the property, just as a Court of law gives exe-

cution against the property of other debtors." * * "The evidence, I think, shows that the tradesmen who supplied the goods supposed and believed that she had separate estate, and dealt with her on that assumption. So far, therefore, as they were concerned, they dealt on the footing of a separate estate. How was it, then, on the part of the defendant? She was, as I have said, living separate from her husband, and had separate estate; and I think that when, under such circumstances, a married woman contracts debts, the Court is bound to impute to her the intention to deal with her separate property, unless the contrary is clearly proved. The Court cannot impute to her the dishonesty of not intending to pay for the goods which he purchased."

This view of the law is given by one of the ablest and most experienced equity judges now living, and upon a full review of all the English cases, and we must confess that it seems to us to have stripped the matter of much of its former complication and confusion, and to be far more satisfactory than any other view which we have yet seen. It would undoubtedly render the separate estate of a married woman liable upon her contracts of suretyship. And it is very obvious, that if she is held capable of assuming such obligations, in any form, so as to become a charge upon her separate estate, it is but an arbitrary requirement that the written contract, which by the Statute of Frauds is required to be in writing in order to bind her for the "debt of another," should go beyond the statute, and beyond the requirements of any positive law, and contain an express stipulation to the effect that she intends to bind her separate estate. This certainly looks like an invention to render the contract inoperative, and might lead simple-minded

suitors to suspect that, when that requirement is met, some other will be made. We suggest again the more satisfactory course of saying, at once, that Courts of Equity will not lend their aid to enforce a contract of suretyship

against the separate estate of a married woman, in whatever form it may be made, or else of allowing such contracts of married women to stand upon the same general footing with their other contracts.

I. F. R.

Supreme Court of Indiana.

JOHN REYNOLDS vs. THE BANK OF THE STATE OF INDIANA.

By the charter of the Bank of the State of Indiana, it was provided, that the bank should not at any time suspend or refuse payment in gold or silver, of any of its notes, bills, or obligations, &c., and that if it should neglect or refuse to do so, then the holder should be entitled to recover the amount with twelve per cent. interest. On the 1st of April 1862, the plaintiff demanded of a branch bank payment of its notes in coin, which was refused, but the amount tendered in United States legal tender Treasury Notes.

Held, (1st,) That the provision in the charter in question, did not amount to a restriction of the right of the bank to avail itself of the privilege of using anything else as money, as a tender, which the United States, by their laws, might legally declare to be such.

(2d), That Congress had *not* the Constitutional power to declare paper money a legal tender; but

(3d), That, considering that the Legislature and Executive Departments of the Federal Government had decided in favor of the existence of such a power, and what the consequences of an opposite decision at the present time by the court would be, they would hold the Treasury Notes to be a legal tender until the Federal Courts should determine otherwise.

Appeal from the St. Joseph's Circuit Court.

The opinion of the Court was delivered by

PERKINS, J.—On the first day of April, 1862, John Reynolds presented to the Branch at South Bend of the Bank of the State of Indiana, certain notes or bills issued by that Branch in the exercise of power conferred by the charter of the Bank, and, within the usual banking hours, demanded their redemption in coin. The Branch refused to redeem the notes in coin, but offered to redeem them in treasury notes, issued under late acts of Congress, and declared by act of Congress to be a legal tender. These

treasury notes, issued as they are upon no specie basis, but simply upon the indebtedness and credit of the government, and designed to circulate as money, fill the definition of bills of credit. The Circuit Court decided against the plaintiff, holding that the Bank might redeem in treasury notes. The charter of the Bank contains this section:—

“Sect. 8. The said bank shall not at any time suspend or refuse payment in gold or silver, of any of its notes, bills, or obligations, due or payable, nor of any moneys received upon deposit; and if said bank at any time refuse or neglect to pay any bill, note, or obligation issued by such bank, if demanded within the usual banking hours, at the proper branch where the same is payable, according to the contract, promise, or undertaking therein expressed, or shall neglect or refuse to pay on demand as aforesaid any moneys received on deposit to the person or persons entitled to receive the same, then, and in every such case, the holder of any such bill, note, or obligation, or the person or persons entitled to demand or receive such moneys as aforesaid, shall respectively be entitled to receive and recover interest on their said demands, until the same shall be fully paid and satisfied, at the rate of twelve per centum per annum, from the time of such demand as aforesaid, and any branch so failing to meet its engagements may be closed as in case of insolvency.”

In the present condition of the country, if the Bank proceeds under this section of the charter to redeem her circulation in coin, she will probably destroy herself, ruin a large portion of her debtors, and distress the people; while, on the other hand, if she is legally bound thus to proceed, and does not, she will thereby also put her own existence in jeopardy.

In this dilemma the Bank asks for a speedy decision of the pending cause, and the plaintiff joins in the request.

The Constitution of the United States, Art. 1, sect. 10, ordains that no State shall “coin money, emit bills of credit, make anything but gold and silver coin a legal tender,” &c. Indiana, in loyal submission to this limitation upon her power as a sovereign State, in framing her Constitution, provided, Art. 10, sect. 7, that “all

bills or notes issued as money shall be, at all times, redeemable in gold or silver": and as we have seen, the legislature in chartering the Bank of the State of Indiana, an institution created to issue a circulating medium of paper, required of her a compliance with this constitutional provision.—Sect. 8, above quoted. From such compliance the State cannot release the Bank. Can the United States do so? is the question. If the United States, under the Constitution, can make treasury notes a legal tender in payment of debts between citizen and citizen, she can make them thus between the States of the Union, corporations and citizens. And coming now to the particular case before us, as the section in the charter of the Bank of the State above quoted, was inserted to make it conform to the restriction upon the power of the State, imposed by the Constitution of the United States, viz., that a state shall not create money, in the constitutional sense of that word, and shall not by her own laws recognise anything as such but gold and silver, it is not reasonable that we should construe that section as a restriction upon the right of the Bank to avail herself of the privilege of using anything else as money, as a legal tender, which the United States, by her laws, might legally declare to be such. The true interpretation of the section must be, that the Bank shall not refuse to redeem her bills in what the Congress shall constitutionally make legal tender money. The Bank cannot be compelled to receive treasury notes from the citizen in one hand, and pay to the citizen gold and silver with the other. Under this construction of the charter, the Act of Congress in question does not impair its obligation, regarded as a contract. But it may be remarked, if Congress can impair the obligation of contracts, in this particular, between citizens, it can also between citizens and corporations, and the States and corporations. The decision of the cause, then, must turn upon the question, Can Congress make treasury notes a legal tender? Can it make anything but gold and silver coin a legal tender? The answer to this question must be drawn from the Constitution of the United States, for it is a judicially established proposition that Congress can exercise such powers only as are granted expressly or incidentally by that instrument. And

the same rule applies to every other department of the Government. It may be further observed that, if the proposition just stated is not true in every particular, then is our Government practically one of unlimited powers, and the Constitution a delusive bauble.

We proceed to investigate the questions above propounded.

I. The power to make treasury notes or anything else but coin, a legal tender, is not expressly given in the Constitution. The money-making power is granted to Congress in these words: "Congress shall have power to coin money, regulate the value thereof, and of foreign coin."

II. Is such power granted as an incident to any substantive power? That it is not, the following considerations strongly tend to prove, viz.:

1. The convention which adopted the Constitution not only did not grant, but they expressly rejected it, as a substantive power, and for the distinctly declared purpose of preventing its exercise by Congress, under any pretext or circumstances whatever—and this too after the power had once been expressly granted to the Federal Government; and the states subsequently ratified the Constitution with this understanding. Articles of Confederation, § 5; Elliott's Debates, vol. 1, pp. 258, 276, 413, and 531; Madison Papers, vol. 2, p. 1232; 3 Id. 1343 *et seq.*; 2 Story on the Const. 2 Ed., commencing at section 1358; Curtis's Hist. Const. vol. 2, pp. 328, 329, 364. The above proposition is established by the debates in the convention: See Madison Papers, *supra*, by the communications of members to their respective states: See Elliott's Deb., *supra*; and by the fact that members of the convention were members of the state ratification conventions.

2. Such paper is unequal to the functions of a national currency. It is claimed that the power to emit bills is an incident to that of regulating commerce—that a medium of exchange, a currency, is a necessity of commerce, and its creation an incident in the regulation of commerce. This argument is not as satisfactory as could be wished. It has apparent weaknesses.

1. As matter of fact, the bills are not emitted on account of commerce. Commerce does not apply for their issue.

2. They are not needed for domestic commerce; for foreign they are useless.

3. It is admitted that currency, as a medium of exchange, is a great necessity of commerce; and it is an acknowledged power of every government to ordain what shall constitute that currency. Governments have done so; but, throughout the civilized world, they have all concurred in declaring that gold and silver shall be that currency. Why they have so declared will be seen as we advance. Now, the precise question of what should be the currency of this nation, what should be its medium of commerce, what should be used to meet that necessity, was the one that was before the convention which constructed the frame of our government; and they ordained and established, by the paramount, the fundamental law of the nation, that that currency should be gold and silver, or paper issued upon and as the representative of gold and silver, and not bills of credit issued simply upon the indebtedness and faith of the government. Hence, it would seem that there could be no incidental power over this question, connected with the regulation of commerce.

And here the question occurs, Why was it ordained by our Constitution that coin should constitute the currency of this nation? As we have seen, currency is the medium of commerce, is created for commerce; and it is a necessity that it should consist of something that will circulate co-extensively with commerce; but commerce is not limited by geographic lines; its domain is the world; the republic of commerce is as expanded as the globe. Hence, to be equal to the exigencies of the subject, the currency must consist of that which will circulate with equal credit all over the globe: something that possesses an intrinsic value, a value not dependent upon the duration or condition of governments; that revolutions and changes in political organizations will not affect; that commerce looks not to, and does not depend upon, the forms of such organizations. The gold and silver in the rebel republic today is as good, the world over, as is that of the old legitimate public, while its bills of credit are becoming as worthless as withered leaves. Such a currency, the experience of the world

proves, paper cannot be. Said Mr. Webster, in his speech on the currency, in 1837, "I am for a sound currency for the country, and by this I mean a convertible currency, so far as it consists of paper. Mere government paper, not payable otherwise than by being received for taxes, has no pretence to be called a currency. After all that can be said about it, such paper is mere paper money. It is nothing but bills of credit. It always has been and always will be, depreciated. Sir, we want specie, and we want paper of *universal credit*, and which is convertible into specie at the will of the holder. That system of currency, the experience of the world, and our own experience, have both fully approved."

Says Mr. Crawford, in his report, in 1820: "By the term 'currency,' the issue of paper by government, as a financial resource, is excluded." *Funding Systems*, p. 743.

But while bills of credit will not furnish a sound currency themselves, they tend to exclude such a currency, viz., coin, from circulation, and to drive it from the country. As such paper will not circulate in foreign countries, the importer, when he has received his balances here in that medium, is compelled to go to the banks and brokers and exchange it for coin, which he takes abroad with him; and, at present, as our main produce-exports are cut off, their place must be supplied by specie; and, as the banks are not required to retain specie for the redemption of their own paper, if the bills of credit are a legal tender, they can, and it is to be feared many of them will, dispose of their entire stock, as it will command a premium over paper, and, ere long, this country be left with nothing but a pure paper medium, without the basis of a dollar of specie. To illustrate:—The great bulk of our produce-exports, in years past, has consisted of cotton, tobacco, and rice. The report of the Secretary of the Treasury for 1861, shows that the value of cotton, rice, and tobacco exported in that year, exceeded two hundred and ten millions of dollars. We are now deprived of these articles of export, and the vacuum must be filled by coin, or commerce be in proportion diminished. So, the interest on our vast bond-indebtedness to foreigners must be paid in specie.

The cotton crop of last year, it would seem, is to be burned, and it is scarcely possible that a crop should be raised this year—(the loss of two cotton crops, in times of peace, would revolutionize the commercial and financial world)—and thus it would seem to be inevitable that a foreign demand will exist that must drain the entire specie from the country, as the counter home demand for it is removed by the bills of credit, if they are a legal tender; and when it is all exhausted what will be done then?

These considerations were vividly in the minds of the Convention that formed, and of the States that adopted our present Constitution. They had before them the then recent history of the issue of continental and state bills of credit, and the disastrous results thereof to the country, and they determined to prevent a repetition of the evils. See the subject most thoroughly discussed in 2 Story on the Constitution, 2d edition, commencing at section 1358.

On the other hand, the legislative and executive departments of the Federal Government have, within the past year, for the first time in the history of the Government, it is true, decided in favor of such a power, and have exercised it; and the disastrous consequences to the country that must follow a denial of the validity of that exercise of power, press hardly upon the judiciary to sustain the violation of the Constitution, if it be such, and thus create a precedent for further usurpations. But with the tribunal of last resort, such considerations should not have influence. The preservation of the Constitution, in its letter and spirit, should be an object outweighing, with that tribunal, all considerations of temporary inconvenience. That such would be the course of this Court, on a question arising under our state constitution, we think its past action will amply sustain us in asserting. In the case at bar, our decision is but that of a *Nisi Prius* Court, and we had better err in acquiescing in, than by declaring null the action of Congress.

Influenced, then, by deference to the action of the Federal Government, by the rule that all doubts must be resolved in favor of the law (a principle that tends constantly to augment the powers

of limited governments); by the exigencies of the times; by the consideration of the local injury, temporarily, to our State that would follow a different decision, and the fact that the question can only be decided finally by the Supreme Court of the United States, we hold that the Act of Congress, making treasury notes a legal tender, is within the Constitution and valid. Such will be the ruling of this Court, till the Federal Court shall determine the question otherwise. The Bank, by redeeming in treasury notes, does not expose her franchises to forfeiture. The judgment below is affirmed with costs.

It is therefore considered by the Court that the judgment of the Court below, in the above entitled cause, be in all things affirmed, at the costs of the appellant; all of which is ordered to be certified to said Court. And it is further considered by the Court, that the appellee recover of the appellant the sum of , for her costs and charges in this behalf expended.

Superior Court of the City of New York. May, 1862.

CHARLES B. HOFFMAN *et al.* vs. DANIEL MILLER *et al.*

M., O. & M., of Baltimore, indorsed in blank and deposited for collection with J. L. & Co., bankers and collecting agents in the same city, a bill payable in New York. The latter indorsed for collection to the plaintiffs, also bankers and collection agents doing business in New York. Each of these two houses was constantly remitting paper to the other for collection, and knew that each remitted paper for collection belonging to third persons. The remitted paper, when payable at sight, was collected, and then credited as cash. That payable in *futuro* was entered in the books of the house receiving it, as received for collection, and was not otherwise credited, unless, nor until it was actually paid. According to the course of business, each house drew for the cash balance in its favor, arising from actual collections, and not against paper remitted and not matured. There was no express agreement between them, that either should hold the paper it held running to maturity, as security for the paper remitted to the other for collection, or for cash balances. J. L. & Co., at the time of remitting the bill in question to the plaintiffs, owed them a small cash balance, and

immediately thereafter received from the plaintiffs other remittances, which they collected, but failed to pay over, and failed in business before the bill in question matured. The plaintiffs were immediately notified that the bill belonged to M., C. & M., but on demand thereof refused to surrender it.

Held, That the plaintiffs could not retain the bill as against M., C. & M., as indemnity against the balance owing to them by J. L. & Co., and that they were not *bona fide* holders for value in such sense as to have acquired a title superior to that of M., C. & M.

Held, also, That evidence by the plaintiffs, that in making the remittances, made after receiving the bill in question, they looked to, and relied on, the unmatured paper in their hands, received from J. L. & Co., was not entitled to any consideration, as neither any agreement nor the course of dealing between them and J. L. & Co., authorized them to so rely, and J. L. & Co. had no reason to suspect that any remittance made to them was influenced by any such consideration.

Appeal by the defendants from a judgment. This suit, when commenced, was brought against *Allan Hay & Co.*, as acceptors of a bill of exchange, dated "*Houston, Texas, September 22, 1860,*" drawn by *John Dickinson* on *Allan Hay & Co.*, of New York, for \$1100, payable thirty days after sight to the order of *Miller, Cloud & Miller*; and "accepted October 5, 1860, payable at the Bank of Commerce, in New York." When received by the plaintiffs it was indorsed thus:—"Miller, Cloud & Miller," "Pay Messrs. Hoffman & Co., or order, for collection, JOSIAH LEE & Co., eleven hundred dollars." Allan Hay & Co. having no defence, except that they were ignorant to whom the bill should be paid (the plaintiffs and Miller, Cloud & Miller severally claiming to own it), were permitted, by an order in the action, to pay the money into Court, and Miller, Cloud & Miller were made defendants in their stead. The question now is, does the money belong to the plaintiffs, or to the substituted defendants Miller, Cloud & Miller?

The plaintiffs' firm, at and prior to receiving the bill, were bankers and collecting agents, doing business in the city of New York; and the firm of *Josiah Lee & Co.* were also bankers and collecting agents, doing business in the city of Baltimore.

Miller, Cloud & Miller, on the 20th of October, 1860, doing business in Baltimore, and then owning the bill in question, deposited it with *Josiah Lee & Co.* for collection, at the same time

indorsing it, in blank, as before stated. On the 23d of October, 1860, Josiah Lee & Co., after indorsing it in the form mentioned, enclosed that and another bill for \$77.31, in a letter of that date, directed to the plaintiffs, and reading thus:—

“MESSRS. HOFFMAN & Co.: Dear Sirs:—We enclose for collection and credit, bills stated below. Respectfully, yours,

JOSIAH LEE & Co.

D. S. Cohen	.	.	.	.	.	.	.	\$77.31
Allan Hay & Co.	.	.	.	.	.	.	.	1100.00”

The plaintiffs, by letter dated October 24, 1860, replied (*inter alia*) as follows:—

“MESSRS. JOSIAH LEE & Co., Baltimore.

Dear Sirs:—We have received your favor of 23d instant, with enclosures as stated.

\$77.31 to your *credit*, and

1100.00 acceptance, Allan Hay & Co., due November 4–7, 1860, which we enter for *collection*.”

Charles B. Hoffman, one of the plaintiffs, and the only witness on their part, testified thus:—“There were two accounts in the books of each; we kept an account of all paper sent to them (*Josiah Lee & Co.*), and it was called ‘our account,’ and drafts drawn against it were entered in that account. All paper received from them, and drafts against us, constituted the other account, which was called their ‘account.’”

Q. Was the acceptance in suit ever passed to the credit of Josiah Lee & Co. upon your books?

A. No, sir; it was never passed upon the ledger; a memorandum of it was kept on the blotter and another small book. It was not our custom to pass paper to the credit of the remitting firm, in those accounts, until the paper matured and was paid, when we passed them on the ledger. Of the two acceptances mentioned in the letter of October 23d, one was paid on sight, and immediately passed to the credit of Josiah Lee & Co.; the other, being the acceptance in suit, was treated differently.

[The entry in plaintiffs' blotter was thus:—

“851.

October 24, 1860.

“JOSIAH LEE & Co., *Baltimore*, (Their account.)

“Their remittance on D. P. Cohen . . . \$77.31

—————\$77.31

“Allan Hay & Co. . . . \$1100”]

Q. Did you ever draw against any particular remittance, payable in future?

A. No, sir.

Q. Did you ever consider yourself entitled to draw as against remittances for collection prior to their maturity?

A. The question never came up.

Q. Did you ever do it?

A. No, sir; we never had occasion to do it.

Q. You did, at this time, a general collection business for account of customers?

A. Yes, sir.

Q. Any one that chose to deposit paper with you for collection, you forwarded it for collection?

A. Yes, sir.

Q. Was not that the general business of Josiah Lee & Co.?

A. Yes, sir; that was one branch; they were in the habit of receiving paper from other parties and transmitting it for collection.

Q. Was there any express and positive agreement between Josiah Lee & Co., in reference to this acceptance, except by the letter and order given in evidence?

A. No, sir, there was not.”

Josiah Lee & Co. failed November 1, 1860, and on the 2d of that month delivered to defendants a written order on the plaintiffs, requiring them to deliver to the defendants the acceptance in question, the order stating, “they (the defendants) being the rightful owners of the same, and we being agents to collect.” This order was presented to the plaintiffs, and the acceptance demanded of them before this suit was brought, and they refused to deliver it to the defendants.

The plaintiffs received the acceptance on the morning of the 24th of October. On the 23d there was a balance due to them from Josiah Lee & Co. of . . .	\$540.26
October 24, plaintiffs paid A. M. Allen on Josiah Lee & Co.'s letter of credit	200.00
October 24, plaintiffs remitted to Josiah Lee & Co. for collection	438.57
October 30, they also remitted to Josiah Lee & Co., for collection, a draft for	3000.00
They drew on Lee & Co., October 29, for	600.00
and October 30, "	3000.00

These drafts were protested; Lee & Co. collected the remittances of October 29th and 30th, and used the proceeds. They now owe the plaintiffs \$3901.53, excluding from the calculation the acceptance in question. *Charles B. Hoffman* was allowed, against the objection and exception of the defendants, to testify, that for several months "we always took into account the paper that we had on hand, in remitting for collection, or drawing down our balances with them."

The judge, before whom the action was tried, found as facts (among others) that the paper, remitted by the one firm to the other, "always appeared to be the property of the party transmitting the same; each treated the paper so received from the other as the property of the party from whom it was received, * * the plaintiffs, until the 2d of November, 1860, had no notice that said acceptance belonged to any person other than Josiah Lee & Co., and relying upon the possession of said acceptance, and other securities, amounting to \$467.50," they paid the \$200 October 24th, and made the remittances of \$438.67, and \$3000,—“and from October 24th to October 29th, left the balance in plaintiffs' favor, arising from the collection of such drafts, and otherwise, in the hands of Josiah Lee & Co., undrawn for.” He held as matters of law, that the plaintiffs, as bankers, have a lien on the bill in question, for the balance due them from Josiah Lee & Co.; and that they have acquired a valid title to the said bill of exchange as *bond fide* holders thereof for value; and gave judgment for the

plaintiffs for the amount of the bill, with interest, and ordered that the money paid into court by the acceptors, be applied on said judgment. The defendants excepted to these decisions; and appealed from the judgment to the General Term.

L. B. Woodruff & C. F. Sanford, for appellants.

Wm. C. Russell & G. Spring, Jr., for respondents.

By the Court. BOSWORTH, C. J.—On the facts, which the evidence will justify a jury or judge in finding, we think no discrimination favorable to the plaintiffs, can be made between this case and *Warner vs. Lee*, 2 Seld. 144, and *Scott vs. The Ocean Bank*, 5 Bosw. 192, and 23 N. Y. R. 289.

In *Warner vs. Lee*, John T. Smith & Co., with whom the plaintiffs had deposited for collection a note owned by them, made by Osborn & Whallon, sent it in a letter to the defendant, a banker, which letter stated that it was "enclosed for collection." In the present case, the indorsement to the plaintiffs stated that it was "for collection." The letter enclosing it (and another draft) stated that they were enclosed "for collection and credit." This, in the light of the evidence given, means that the draft for \$77.31 was enclosed to be credited to Josiah Lee & Co., and the one for \$1100, for collection. The small one was paid at sight, and was credited to Josiah Lee & Co. The large one—the one in question—was entered on the plaintiffs' blotter, as received for *collection*, and was never otherwise credited to Josiah Lee & Co.

In *Warner vs. Lee*, the plaintiffs had received no advances from John T. Smith & Co. The present defendants received none from Josiah Lee & Co.

In *Warner vs. Lee*, Smith & Co. were largely engaged in making collections of notes for merchants in New York, and the defendant was aware of that fact. In the present case, Lee & Co. "were in the habit of receiving paper from other parties, and transmitting it for collection." One of the plaintiffs so testifies, and of course he was aware of that fact

In each case the accruing balances were collected in a similar manner.

In *Warner vs. Lee*, the referee did not find that any advances were made by defendant to John T. Smith & Co., on the credit of the note there in question. In the present case, the judge has found that the plaintiffs made advances to Josiah Lee & Co., on the credit of the acceptance in question. We shall attempt to show that this finding is not warranted by the evidence. Assuming, for the present, that this is susceptible of demonstration, then there is no difference between the facts of these two cases—except that in *Warner vs. Lee*, the note there in question was collected, and the proceeds received by the defendant, before any formal notice was given to him that the note was not the property of Smith & Co.; while in the present case, the plaintiffs did not collect the acceptance in question, and had formal notice before this suit was commenced, that it was the property of the defendants.

In *Warner vs. Lee*, the court said, that “When the defendant received this note he had notice, from its indorsement, from the course of business of Smith & Co., with which he was acquainted, and from the letter which enclosed the note to him, that it was placed in his hands for collection only, on account of the owners, the plaintiffs in this suit.” Under these circumstances, if he had made advances upon account of it, he could not have held the note or its proceeds, against the plaintiffs. *Clark vs. Merchants’ Bank*, 2 Comst. 380.

In the present case, the plaintiff had the same notice, except such as the *indorsement* furnished. In *Warner vs. Lee*, the plaintiffs indorsed the note in blank on delivering it to Smith & Co., and they filled up the blank indorsement with the defendant’s name; whereby it was, in form, specially indorsed by the plaintiffs to the defendant. In the present case, the blank indorsement of the defendants was left as they wrote it, and Josiah Lee & Co. wrote under it a special indorsement by themselves to the plaintiffs, in terms stating it was for collection. The present plaintiffs had notice, therefore, that Lee & Co. had received it for collection; that they sent it for collection for the owners; and the natural

inference would be that the payees were the owners, it being indorsed only by them, and by Josiah Lee & Co. *Arnold vs. Clark*, 1 Sandf. S. C. R. 491, supports these views. If it be thought that the decision in *Warner vs. Lee* conflicts with that in *The Bank of the Metropolis vs. The New England Bank*, 1 How. U. S. 234, it would, nevertheless, be our duty to follow it, it being the decision of the court of last resort of this State, and controlling upon us. The latter case was cited in *Warner vs. Lee*, 2 Seld. 146, and of course was not overlooked.

In *Clark vs. The Merchants' Bank*, 2 Comst. 380, the court treated the material and controlling question as being "whether the bill in question was transmitted to Smith & Co., for *collection merely*, or was to be credited to the plaintiffs *when received* by the former, whether collected or not." Id. And to complete the statement of the material elements entering into the question, GARDINER, J., added: "As the bill was indorsed in blank by the plaintiffs, the legal title passed to Smith & Co., *prima facie*, and the plaintiffs must establish the fact that it was indorsed and forwarded for the purpose of collection."

In the present case, the plaintiffs have proved by evidence which is uncontradicted, that *Miller, Cloud & Miller* deposited the bill with Josiah Lee & Co. for *collection*; that the latter indorsed it specially to the present plaintiffs, and stated in the indorsement itself that they indorsed it to the plaintiffs for *collection*, and that the plaintiffs, on receiving it, entered it in their books as having been received for *collection*, and by letter to Josiah Lee & Co., informed them that they had entered it for *collection*.

In *Clark vs. The Merchants' Bank*, *supra*, GARDINER, J., discusses the evidence therein, as to the classes of funds remitted, and came to the conclusion that one class was remitted to be credited as *cash when received*, and to be drawn against, whether paid or not, at the time of so drawing; and that another class was remitted for collection, and was not to be credited or drawn against, until actually paid.

As to the class which was to be credited as *cash when received*, the Court held that the title passed to John T. Smith & Co., on

their reception of the same, and that their application of the *proceeds* to the payment of their own debt, could not be questioned in a suit against creditors (of John T. Smith & Co.) receiving them in good faith.

The error of the Court below was stated to consist in the assumption "that nothing went into account properly" until collected in the course of business (or in other words that nothing was to be credited as cash *when received*). Id. 385. GARDNER, J., summarily states the position of the parties, *inter se*, with reference to the different classes of remittances, thus: "For the first class they were to be credited with the right to draw upon their correspondents; as to the second and third the N. Y. firm were the *agents* of the plaintiffs, and had no other interest in and control over the assets, than such as was necessary to the discharge of their agency." Id. 385.

In *Scott vs. The Ocean Bank*, 5 Bosw. 192, and 23 N. Y. R. 289, the Court held, that,—

1. The property in notes or bills transmitted to a banker by his customer, to be credited the latter, vests in the banker only when he has become absolutely responsible for the amount to the depositor.

2. Such an obligation, previous to the collection of the bill, can only be established by a contract to be expressly proved, or inferred from an *unequivocal* course of dealing.

That case, in all of its material facts, bears a close resemblance to the one before us. And the Court say: "When, therefore, it appears that the bill in question was retained in the possession of the company (the party to whom it was sent for collection), after its acceptance, and that no credit had been given for it at the time it was passed to the defendants, and when nothing is disclosed in the whole course of dealings between the parties to show that any bill was ever credited or agreed to be credited in account before its collection, or that *Lyell* (the remitter) ever drew or was entitled to draw on the company, or that it was bound to accept drafts otherwise than upon and for funds actually received in cash, it must be understood that the company at the time of the transfer

stood in the relation of agents for its collection merely." In that case, the defendants received the bill from the company to secure a pre-existing indebtedness, and credited its proceeds to the company after it was paid; and they were held liable to the plaintiff for its amount.

If, therefore, it is clear upon the evidence that the present plaintiffs did not, and were not under any obligation to credit the bill in question to Josiah Lee & Co. *when received*, and that there was no agreement or understanding between them that remittances or collection or a delay to draw for cash balances was to be based upon or influenced by the consideration of holding paper sent for collection and not matured, then it will follow that the judgment in this case is in conflict with *Warner vs. Lee* and *Scott vs. The Ocean Bank, supra*.

With reference to this question, it may be observed, *first*, that the learned judge who tried this cause states in his opinion that the only ground upon which the plaintiffs' claim can rest, is a mutual agreement between themselves and Josiah Lee & Co., that all remittances, made by either to the other, should be considered as made upon the faith of any prior remittances by the latter to the former, unless notice was given of the interest of others in the paper first remitted;" and, *second*, that the learned judge did not do so as a *fact* that any such *agreement* was ever made.

There is no evidence that any express agreement to that effect was ever made. And we think it quite clear that no such agreement can be inferred from the course of dealing between those parties.

Charles B. Hoffman, one of the plaintiffs, testified as to the course of dealing between his firm and Josiah Lee & Co. thus: "We remitted to them, and they to us; they kept an account with us, and we with them; they drew upon us, and we upon them; we sent paper for collection and so on; their remittances to us, if at all, were collected at once and passed to their credit; the same course was pursued with the paper we sent them." That the question whether the plaintiffs "were entitled to draw as against remittances for collection before their maturity," "never came up;" that they never did it nor had occasion to do it, and that he

does not remember that his firm ever drew "otherwise than against balances" of collections actually made.

The only circumstance furnishing any evidence of any exception to this, as the uniform course of business, is in the testimony of Mr. Hoffman, to the effect that he remembered "one instance when we (his firm) paid a large over-draft by them" (Josiah Lee & Co.). By over-draft, as here spoken of, we understand a draft for a larger amount than the cash balance then standing to the credit of Josiah Lee & Co. Mr. Hoffman testifies that neither firm was "ever under obligation to pay any such draft," and that he thinks there were two or three instances of over-drafts by Josiah Lee & Co.

In opposition to this exceptional transaction, and in support of the understanding being in accordance with that indicated by the usual and common course of their business, is the fact that bills on time, when received, were entered in the books of the plaintiffs as having been received for *collection*, and were never otherwise credited, until actually collected; that the bill in question was sent, entered, and by plaintiffs' letter is admitted to have been received for collection, and never was otherwise credited to Josiah Lee & Co.

This evidence does not in any manner justify the finding of such an agreement, as the Court at special term held it essential for the plaintiffs to establish in order to recover; nor does it furnish any evidence of an obligation on the part of the plaintiffs to give credit to Josiah Lee & Co. for it until actually paid; or of any assent on their part that it, or other bills received under like circumstances, should be held by the plaintiffs as security for remittances subsequently made by them, or for the payment of any cash balance in their favor that might then happen to exist, or might subsequently accrue.

Under such circumstances, evidence by Mr. Hoffman "that we (his firm) always took into account the paper that we had on hand, in remitting for collection or drawing down our balances with them, *at least we did for several months*," should not be allowed any weight.

The answer imports, that this mental operation to which he testifies was of late occurrence and short duration; there is no pretence that it had been disclosed to Josiah Lee & Co., or was authorized or suspected by them—and so long as it is essential to a valid agreement that there should be at least two parties to it; evidence of what the plaintiffs “took into account or consideration,” or “looked very closely and relied upon” in making remittances or delaying to draw cash balances, should be disregarded when it is clear that it was unauthorized, and that Josiah Lee & Co. had not the slightest reason to suspect anything of the kind.

We think, therefore, that no discrimination favorable to the plaintiffs can be made between this case and *Warner vs. Lee*, and *Scott vs. The Ocean Bank*, *supra*. That on the evidence it is clear that the plaintiffs received the bill for collection, and knowing that Josiah Lee & Co. received and forwarded to them for collection paper belonging to third persons, as well as paper owned by themselves; that Lee & Co. were not entitled to be credited with the bill until actually collected, and that there is no evidence justifying the claim of a mutual agreement or understanding that remittances for collection by either were made on the faith and security of paper in their hands, not matured and previously received for the like purpose, from the house to which such remittances were made.

We do not deem it material or useful to attempt to discriminate between *The Bank of the Metropolis vs. The New England Bank*, and *Warner vs. Lee*, or *Scott vs. The Ocean Bank*, *supra*. If it be supposed that no material difference exists, it is none the less our duty to conform our decision to the law, as declared by the Court of *dernier resort* of this state.

It is not to be denied, however much it is to be regretted, that there is an apparent conflict between the Courts of this and other states, as to the circumstances sufficient to constitute an indorser of paper a *bond fide* holder for value, so as to exclude the equities of third persons, or defences that could be made in a suit between the original parties. *Stalker vs. McDonald*, 6 Hill 98; *Warner vs. Lee*; *Scott vs. The Ocean Bank*, *supra*; *Swift vs. Ty-*

son, 16 Peters 1; *Le Breton vs. Pierce*, vol. 9, Am. L. R. 737, and note thereto in vol. 1, Id. N. S. p. 35.

It may be observed, however, that the *head note* in *Swift vs. Tyson* enunciates no rule in conflict with the decisions in this state, and if the fact was proved in that case (as asserted in the argument of Mr. *Fessenden*), viz.: "that on receiving the acceptance, he (the plaintiff) had given up the note of Norton & Keith, *which had been endorsed by one Child*," the decision is in harmony with those of this State.

The learned author of the *note* upon *Le Breton vs. Pierce*, 1 Am. L. R. N. S. p. 38, states that "it has always seemed to us that most of the controversy upon this subject has grown out of the different sense in which the terms are understood. If the term 'collateral' is understood to import that the bills thus held are not taken *on account* of the existing debt, *but only to be held until due, and if paid, the amount* to be applied, and in the mean time the creditor assumes no responsibility in regard to them, *except as the mere agent of the debtor for collection*, there could be no ground of claim that any property passed, or that existing equities in former parties were extinguished."

In *The Bank of the Metropolis vs. The Bank of New England*, *supra*, the Court says, "There does not, indeed, appear to be any express agreement that those balances should not be immediately drawn for, but it may be *implied*, from the manner in which the business was conducted; and *if* the accounts show that it was their *practice* and *understanding* to allow them to stand and *await the collection of the paper remitted*, the rights of the parties are the same as if there had been a positive and express agreement." This seems to hold that either an express agreement, or one justly inferrible from competent evidence, of the actual understanding of the parties, of the character stated, would make a holder of bills, received under that agreement, a holder for value to the extent of any balance due to him.

This may be conceded to be law, and yet, if we have taken a correct view of the evidence in the present case, and of its legal effect, the plaintiffs have failed to bring themselves within the

rule. They have not shown an express agreement of this character; they have not furnished any evidence that it was their practice, or the understanding between them and Josiah Lee & Co., that cash balances should stand and await the collection of paper remitted to the party in whose favor a balance might exist.

The judgment must be reversed, and a new trial granted, with costs to abide the event.

Ordered accordingly.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF MASSACHUSETTS.¹

Spirituous Liquors—Action for Liquors illegally consigned for sale—

Who is an Importer.—One who has consigned spirituous liquors to another to be sold in violation of statute 1855, c. 215, cannot maintain an action for the breach of an agreement by the consignee to render an account of sales, pay the value of the liquors sold, and return the residue : *King vs. McEvoy*.

One who receives from an importer, and duly forecloses, a mortgage of a cask of spirituous liquors, which is in the United States warehouse, in bond, and pays the duties and receives the cask of liquors, does not thereby become the importer thereof, within the meaning of statute 1855, c. 215, § 2: *Id.*

Common Carrier—Measure of Damages.—In an action against a carrier to whom goods have been intrusted, for not delivering them according to contract, the measure of damages is the value of the goods at the place of delivery, and at the time when they should have been delivered; with interest from that time : *Spring vs. Haskell*.

Award—Partiality of Arbitrator.—An award is rightly rejected if, previously to the selection of the arbitrators, a portion of them made an *ex parte* examination of the matter afterwards submitted to them, at the

¹ From Charles Allen, Esq., State Reporter.

request of one of the parties, to whom the substance of the result at which they arrived was known, and these facts were not communicated to the other party. So also, it is a good reason for setting aside an award, and refusing to recommit it to the same arbitrators, if they decided upon the matters submitted to them before giving notice of a hearing to one of the parties: *Conrad vs. Massasoit Insurance Company*.

Divorce—Recrimination.—A wife who has wilfully and utterly deserted her husband for a period of five years, without fault on his part during that time, cannot maintain a libel for divorce against him, on account of his subsequent adultery. But she may maintain her libel, if, before the expiration of the five years, he has taken another woman for his wife: *Hall vs. Hall*.

Infancy—Ratification of Contract made during Minority.—A direct promise, when of age, is necessary to establish a contract made during minority, and a mere acknowledgment will not have that effect: *Proctor vs. Sears*.

A conditional promise, when of age, to perform a contract made during minority, will not sustain an action thereon, without proof that the condition has been fulfilled: *Id.*

Life Insurance—Suicide—Construction of Policy.—Suicide committed by a person who understood the nature of the act, and intended to take his own life, though committed during insanity, avoids a policy of life insurance, which provides that it shall be void, if the assured shall die by his own hand: *Dean vs. American Mutual Life Insurance Company*.

Justice of the Peace—Action.—No action lies against a magistrate to recover damages sustained by reason of his taking an invalid recognisance: *Way vs. Townsend*.

Void Consideration of Contract.—No action lies on a promise by a railroad company to pay to the widow of one who was killed by an accident on their railroad a certain sum of money, in consideration of her forbearance to sue them for damages: *Palfrey vs. Portland, Saco, and Portsmouth Railroad Company*.

Estoppel—Public Officers not Agents of a City.—A city is not estopped from claiming land which it owns, by the wrongful act of its assessors in

taxing it to a person who had no title to or possession of the same, or by a collector's sale for non-payment of such tax: *Rossire vs. City of Boston*.

Way.—A city is not liable for an injury caused by the combined effect of the unsafe condition of a highway, and the unlawful or careless act of a third person: *Shepherd vs. Inhabitants of Chelsea*.

Award—Presumption in favor of.—The legal presumption, unless the contrary appears, is, that arbitrators decide all the matters which are submitted to them, and only those: *Sperry vs. Ricker*.

SUPREME COURT OF PENNSYLVANIA.¹

Ejectment, effect of Verdict and Judgment on Equitable Title—Judgment in, how to be entered—Lien Docket, an Index next the record.—Though one verdict and judgment in ejectment upon an equitable title is conclusive between the parties, and a bar to any subsequent ejectment for the same land, yet in order to have this effect, the judgment upon the verdict must have been regularly entered on the record: it is not enough that the jury fee was paid after verdict, and an entry thereof indexed in the lien docket: *Ferguson & Betts vs. Staver*.

The lien docket is not the record of judgments, but only their essential index: and the entry in the lien docket does not make the judgment, but only refers to one supposed to be already made: *Id*.

In an action of ejectment by F. & B., the holders of the legal title to the undivided half of a tract of land, against S., who claimed under an equitable title, a verdict was returned for the defendant, but, the charge of the court being excepted to, no judgment was regularly entered upon the verdict: the jury fee was paid by the defendant, and the verdict indexed in the lien docket. A second ejectment for the same land, and between the same parties, was brought, and a verdict found for the plaintiffs, upon which judgment was regularly entered, which was never reversed. Afterwards a third ejectment was brought by S. against F. & B., and a verdict rendered for the plaintiff, which was reversed by the Supreme Court, and a new trial ordered. On the new trial, S., the plaintiff, set up and relied upon the record of the verdict in the first ejectment as a bar to defendant's recovery; whereon judgment was entered for the plaintiff by

¹ From Robert E. Wright, Esq., State Reporter, to be reported in the 4th volume of his Reports.

the court below. *Held*, that the record was not a bar, and no defence, for there had been no judgment entered upon the verdict, the payment of the jury fee and the entry upon the lien docket not being equivalent thereto; that there being a verdict and judgment in favor of the defendants, F. & B., in the second ejectment, it was conclusive in their favor—and that judgment should have been entered for them by the Court below: *Id.*

After-acquired Real Estate when included in general Devise—Act of April 8th 1833 construed—Effect of electing to take or reject Property given by Will.—One, by will dated in 1829, devised to his wife all the real estate of which he should die possessed: in 1847 he purchased a farm, which he held until his death, in 1850, when his widow entered into possession under the will: in 1857 she sold the farm, taking as a part of the purchase-money three judgment-bonds, and the same year died, leaving a will, wherein she gave one half of the residue of her estate to her own brothers and sisters, and the children of such as were deceased, and the other half to the brothers and sisters of her deceased husband, and their children. After her death, her executors issued executions upon the judgment-bonds, given for the farm sold by her, which were stayed by the Court, and the defendant—the purchaser—let into a defence, upon the ground that the title was not in the widow, but in the heirs of her husband. *Held*,

That the will of the testator, executed in 1829, did not pass the farm purchased by him in 1847, as the 10th section of the Act of 8th April 1833, providing that real estate acquired by the testator after the date of his will shall pass by a general devise, did not apply to a will dated before its passage: *Gable's Executors vs. Daub.*

But that, if the heirs of the testator, who were his brothers and sisters, and their children, and who, under the will of the wife, were entitled to one-half of all the property of which she died possessed, including the judgment-bonds given for the purchase of the farm, should elect to take under that will, their title would pass to the defendant, the purchaser, and the plaintiffs, her executors, were entitled to recover on the judgment-bonds given by him, as the words of the will of the testator were sufficient to include after-acquired real estate, and his heirs could not claim both under and against her will: *Id.*

Executors, Liability of, for Interest—Partial Distribution allowed where absent Distributees are secured—Payment into Court by Executor when

proper—Grandchildren when not included in term Children.—Where the assets of a decedent's estate are invested and drawing interest, the executors, after filing their account, are chargeable with interest upon the balance for distribution therein up to the date of the final decree, even though they have charged themselves with the principal of the uncollected securities; and it was not error in the Orphans' Court to confirm an auditor's report, wherein, upon part of the fund, interest was charged from the date of a former auditor's report and upon the balance, from the date of the confirmation of the first account by the Supreme Court, up to the filing of the second report, though the first auditor's report was filed before the confirmation of the first account, and in the second, the auditor went back of that account as confirmed to the date of the first report, as a period from which to calculate the interest upon a part of the fund: *Appeal of Gable's Executors.*

It is not error to permit a partial distribution of an estate (a share in which is claimed by one whose right as a legatee under the will had not been determined), if, in the opinion of the Orphans' Court, enough of the estate remains thereafter to satisfy the claim when it should be established; if not, a sufficient sum should be set apart and invested under the direction of the Court to abide the event: *Id.*

Where the names and number of the children of one of those entitled under the will, who died before testatrix, had not been ascertained; it was not error in the Orphans' Court to order the share of the father to be paid into Court, to await further order and decree; for in this way the executors would be relieved from responsibility, and the distribution to each child made as by law entitled: *Id.*

A testatrix by will divided the residue of her estate into two parts, giving one half to her brothers and sisters of the whole blood, and the children of such of them as were deceased, share and share alike, the children of each deceased brother or sister to take together for their share, an amount equal to the share of a surviving brother or sister, and no more; the other half of her estate was given to the brothers and sisters of her deceased husband and their children in similar terms. *Held*, that under the will "grandchildren" were excluded, and were not entitled to any portion of the estate, as the word "children" in itself did not include "grandchildren" or "issue"—therefore it was error in the Orphans' Court to award any portion of the estate to the grandchildren of the deceased brothers and sisters of testatrix, or those of the brothers and sisters of her deceased husband: *Id.*

Conditional Subscription to Railroad Companies—Defence to Action for Instalments on Stock.—One subscribed in 1853 for twenty shares of the stock of the Pittsburgh and Connellsville Railroad Company on the express condition that the company "should locate and construct their railroad along the route contemplated by the Meyer's Mill Plank-Road Company for their road," paid one instalment, part of the second, but delayed the payment of the balance as the calls were made, until the company, before the road was *constructed* along the route mentioned, suspended operations, after which payment was refused on the ground that though the road had been *located* by the company, they had not *constructed* it, according to the condition in the subscription. In an action brought therefor by the company it was *Held*,

1. That the promise of subscription being precedent to that of construction upon the part of the company, the defendant could not insist upon performance by the railroad company while he refused performance on his part; and that the road having been located as stipulated, and completed so far as the means of the company would allow, it was a compliance with the condition, and the plaintiffs were entitled to recover: *Miller vs. The Pittsburgh and Connellsville Railroad Company*.

2. That the condition in the contract of subscription was not a condition precedent, and did not require the completion of the road before payment could be required, but only that when located and constructed it should occupy the route designated, the undertaking being, on the part of the subscriber, to pay as calls should be made by the directors, and on the part of the company to locate as stipulated and construct as fast as their means would allow: *Id.*

3. That the suspension of operations made by the directors, long after the payments upon defendant's stock had been due, was not a defence in an action brought against him for the unpaid balance thereon: *Id.*

4. Where the company had received subscriptions on a guarantee that they would pay interest on stock "as soon as paid," until the road was finished, interest would not accrue until the stock was fully paid; and where but a small part of the stock had been paid for by the defendant, he could not, in a suit against him for the balance, set up the non-payment of interest on his stock by the company as a breach of condition: *Id.*

Custom of Merchants as to Credit on Sale of Goods—Evidence of, in Action for Goods sold and delivered.—Where suit was brought for a bill

of goods sold more than six years before, and the Statute of Limitations was pleaded; evidence of the practice and custom of the trade to sell goods upon a system of credits, was held inadmissible for the purpose of proving that the price was not to be paid when the goods were sold, but on a certain date thereafter, so as to avoid the bar of the statute by showing that the bill was not due until within the six years; and it was error in the Court below to receive the evidence and refer it to the jury as testimony from which they might infer a contract different in terms from that exhibited in the account: *Hursh vs. North, Chase & North*.

But if any such general custom had been proved, or a special custom affecting the peculiar locality or trade, it would have been the law of the contract, and both parties would have been bound by it: *Id.*

The usage and practice of the firm, though not good as a custom, would have been binding, if expressly made part of the contract, or shown to have been known and assented to by the defendant at the time: and evidence of such a contract, either direct, or by proving a course of dealing between the parties on such terms, and of such frequency, as to justify the inference that the transaction was on the accustomed terms, is admissible: *Id.*

Lien of prior Execution, when postponed to subsequent one by conduct of Plaintiff.—If an execution be issued, not for the enforcement of the judgment by levy and sale, but for the purpose of a lien, and to acquire security for the debt, it will be postponed to a subsequent execution issued in good faith: *Freeburger's Appeal*.

Where the plaintiffs in the prior execution alleged that they had given orders to the sheriff to proceed and sell before the second execution came into his hands, they must prove the fact affirmatively, or their execution will lose its priority: *Id.*

Where one of the plaintiffs and his attorney instructed the sheriff, when the execution was placed in his hands, "not to proceed until further orders;" afterwards, that he "should make a levy, but not sell;" and subsequently, by arrangement, permitted the debtor to have access to the property levied, giving him the keys of the shop, it is sufficient evidence that their execution was not issued to collect the judgment-debt, but for another purpose, which was not legitimate nor protected by the law: *Id.*

COURT OF CHANCERY OF THE STATE OF NEW JERSEY.¹

Dower—Right to a Sum in gross in lieu of.—In proceedings for partition, where after a sale of the premises the widow, who was entitled to dower therein, had agreed in writing under her hand and seal, according to the statutes of this State, to accept in lieu of her said dower such sum in gross as the Chancellor should deem reasonable, and then having died before distribution, it was *held*, that the right vested in the widow to receive a sum in gross, interest could not be divested by her death, but should go to her children. *Held further*, that the value of the widow's interest should be ascertained on the principles of life annuities: *Mulford vs. Hiers*.

Where the estate is ordered to be sold, and the widow agrees to accept a gross sum in lieu of dower, and she dies before a sale of the premises, her estate is determined by her death, and her children can have no claim to any portion of the proceeds of the sale: *Id*.

Railroad—Construction of Charter—Terminus.—The charter of the defendants contained the following clause: "the president and directors of said company be and they are hereby authorized and invested with all the rights and powers necessary and expedient to survey, lay out, and construct a railroad from some suitable point in the township of Orange, in the county of Essex, to some suitable point in Orange street, or some street north of the said street, or south of Market street, in the city of Newark."

Held, that this enactment relates not to the *route*, but to the *termination* of the road, and that thereby the road of the company was not excluded from being located in or through Market street: *McFarland vs. The Orange, &c., Horse Car Railroad Company*.

Corporation—Transfer of Stock in Blank—Collateral Security.—Shares in a corporation, whose charter provides that the capital stock of the company shall be deemed personal estate, and "be transferable upon the books of the said corporation," can be effectually transferred as collateral security for a debt, as against a creditor of the bailor, who attaches them without notice of any transfer, by a delivery of the certificates thereof, together with a blank irrevocable power of attorney for the transfer thereof from the bailor to the bailee: *The Broadway Bank vs. Thomas McElrath*.

¹ From Mercer Beasley, Esq.; Reporter of the Court, to be reported in the 24 volume of his Reports

M. delivered to the complainants the certificates of certain stock of a corporation, accompanied by a power of attorney irrevocable for the transfer thereof, as collateral security for certain of his notes, and the renewals thereof. The charter of said corporation provided that its capital stock should be deemed personal estate, and "be transferable upon the books of said corporation: and further, "that books of transfer of stock should be kept, and should be evidence of the ownership of said stock in all elections and other matters submitted to the decision of the stockholders of said corporation." A creditor of M. then levied an attachment upon this stock. *Held*, that the transfer to the complainants was effectual as against such attaching creditor: *Id*.

Divorce—Desertion.—To establish a case of desertion sufficient to authorize a divorce, it should appear that the wife left her husband of her own accord, without his consent and against his will, or that she obstinately refused to return without just cause on the request of her husband: *Jennings vs. Jennings*.

Desertion cannot be inferred from the mere unaided fact that the parties do not live together: *Id*.

Bridge between two States—Compact between Pennsylvania and New Jersey—Exclusive Franchise—Constitutional Law.—Upon principles of public law, it is clear that the power of erecting a bridge, and taking tolls thereon, over a navigable river which forms the coterminous boundary between two States, can only be conferred by the concurrent legislation of both States: *The President, Managers, &c., vs. The Trenton City Bridge Company and Others*.

When the power to make and maintain such bridge, and take tolls thereon, has been given by the joint legislature of both States, the principle could hardly be admitted, that either State, by its separate legislation, could declare that no other bridge should be built across such river within certain limits, and thus render the franchise exclusive: *Id*.

By the agreement entered into between the States of New Jersey and Pennsylvania, the river Delaware, in its whole length and breadth, is to be and remain a common highway equally free and open for the use of both States, and each State is to enjoy and exercise concurrent jurisdiction within and upon the water between the shores of said river. Both States concurred in granting to complainants the right to erect and maintain their bridge, and take tolls thereon. The legislature of New Jersey after.

wards passed an act declaring "that it should not be lawful for any person or persons whatsoever to erect, or cause to be erected, any other bridge or bridges across the said river Delaware at any place or places within three miles of the bridge to be erected."

Held, that even if it was the intention that this act should take effect without the assent of the State of Pennsylvania, that it is void on the ground that it is in contravention of the agreement above mentioned between the two States. As neither State, by the exercise of her sole jurisdiction, has the right, by the terms of the agreement, to grant the franchise, so neither can lawfully contract to refuse to grant it: *Id.*

Under the circumstances, as exhibited in the case, it was *further held*, that the Act of 1801, which conferred the exclusive privilege on the complainants, was not designed by the legislature of New Jersey to go into effect until the same had received the assent of the legislature of Pennsylvania: *Id.*

Whether a corporation has violated its charter, or forfeited its franchise, is a question solely for the determination of a court of law: *Id.*

But when a bridge company, setting up an exclusive right within certain limits, asks an injunction to prohibit the building a bridge within such limits, a court of equity will not lend its assistance when it appears from the answer that the bridge of the complainants has been so far appropriated to the uses of a railroad as to render it inconvenient and dangerous for ordinary travel: *Id.*

Vendor and Vendee—Assumption of Mortgage-Debt.—Where one purchases land, and assumes in his deed to pay off a bond and mortgage of his grantor, to which such land is subject, he thereby becomes a surety in respect to the mortgage-debt: *Klapworth vs. Dressler & Is.*

This obligation of the purchaser to pay the debt enures in equity to the benefit of the mortgagee, and he may enforce it against the purchaser to the extent of the deficiency in a bill to foreclose: *Id.*

Trust—Fraudulent Conveyance—Religious Corporation—Restriction on Alienation.—The trustees of a religious, literary, or other benevolent association, irrespective of any special power conferred by their charter, cannot purchase and hold real estate under trusts of their own creation which shall protect their property from the reach of their creditors: *Magie vs. The German Evangelical Dutch Church of Newark.*

Where property is given to a corporation in trust for a charitable use,

the trust is the creature of the donor, and he may impose upon it such character, conditions, and qualifications as he may see fit: *Id.*

But the case is widely different where a corporation attempts, by means of its own devising, however honest and well intentioned, to place its own property beyond the reach of its creditors: *Id.*

The premises in question, and upon which the defendants had erected a house of worship, were conveyed to them for the consideration of one thousand dollars. The deed was an absolute conveyance in fee upon certain trusts that the property should be held as a Lutheran Church for ever, &c., and contained a clause that the grantee should not by deed alienate, dispose of, or otherwise charge or encumber said property, &c. The corporation executed a mortgage to secure a legitimate debt:

Held, that the corporation had the legal title to the land, and the power at law of executing the mortgage, and that there was no equity in refusing to enforce the mortgage for the payment of an honest debt of the corporation under color of protecting a charitable use: *Id.*

SUPREME COURT OF NEW YORK.¹

Writ of Prohibition.—The writ of prohibition does not issue to correct errors or irregularities in administering justice by inferior courts, but to prevent courts from going beyond their jurisdiction in the exercise of judicial power in matters over which they have no cognizance: *The People, ex rel. Brownson, vs. Marine Court of New York.*

It ought not to issue where the party has a complete remedy in some other and more ordinary form: *Id.*

The writ will not be issued upon the ground that the affidavits on which proceedings by attachment were founded did not show certain matters which were necessary to justify the issuing of the attachment: *Id.*

Nor will it be issued on the ground that the debt for which the plaintiff was entitled to sue in the court below, was larger than the jurisdiction of that court permitted to be recovered there; provided the plaintiff, to obviate that difficulty, remits all beyond the amount of which the court has jurisdiction: *Id.*

Principal and Agent.—An agent cannot act for his own benefit in relation to the subject-matter of the agency, to the injury of his principal: *Bruce et al. vs Davenport.*

¹ From the Hon. O. L. Barbour, Reporter of the Court.

An agent is bound to follow the instructions of his principal ; and if he neglects to do so he will make himself liable for the loss or damage which his principal sustains : *Id.*

The plaintiffs were employed by T. D., in behalf of himself and J. D., who were partners, as their brokers and agents, to sell a certain promissory note held by them, made by third persons, and were instructed to sell the same at a discount of twelve per cent., without their indorsement and without recourse. Subsequently the plaintiffs called upon J. D., in the absence of T. D., and, by falsely stating that T. D. had before indorsed similar notes which the plaintiffs had been employed to sell, and concealing from him the fact that T. D. had instructed them to sell without recourse, procured from him the indorsement of the name of the firm upon the note. *Held*, that the indorsement having been obtained by an abuse of the confidential relation of principal and agent, did not constitute a contract upon which the latter could sue the former : *Id.*

Held, also, that for the same reasons the indorsement could not be considered a modification of the instructions to sell without recourse ; and that, for whatever damage the principals had sustained by the disregard of their instructions, the agents were liable : *Id.*

Deed—Exception.—A grantee, by accepting a deed containing an exception of certain lands previously sold and conveyed to another, and then entering into the possession of the lands thus excepted, will be deemed in law to have entered in subserviency to the title of the grantee of the excepted land, and to continue to hold in subserviency thereto ; unless he can establish the contrary by some clear and unequivocal act or claim of title in himself : *Rosseel vs. Wickham.*

Fire Insurance ; who can sue on Policy.—Policies of insurance are not deemed, in their nature, incidents to the property insured, and do not cover any interest which a person other than the insured may have in the property, as heir, grantee, mortgagee, or creditor, unless there be a valid assignment of the policy : *Wyman vs. Prosser.*

The contract of insurance being a mere personal contract, in no way attached to or running with the real property insured, it does not pass with it, either to a grantee or an heir. The executor or administrator is the only one who can take the contract and enforce it : *Id.*

NOTICES OF NEW BOOKS.

REPORTS OF CASES DETERMINED IN THE SUPREME COURT OF THE STATE OF ILLINOIS, at April Term 1861, and January Term 1862. By O. PECK, Counsellor at Law. Vol. XXVI. Chicago, Illinois. E. B. Myers.

The Reports of the State of Illinois, especially during the period of the present accomplished and faithful reporter, have acquired a very high reputation throughout the Union. The present volume seems to us fully equal to any of the preceding ones. In the essential and important particulars of brevity and point in the opinions of the judges, we have noticed a constant advance for some time, and now regard these reports as a model in that particular, well worthy of imitation.

The number of cases to be decided has so much increased of late everywhere, that it has become indispensable that no discussion be admitted into the reports not strictly pertinent to the questions determined. And while some of the reports have been prompt to apprehend this necessity, others have not seemed to comprehend it with equal readiness. The Illinois Reports are at present greatly in advance of most of the other states in that respect.

We have been surprised to find so many important questions, where the authorities are not referred to, and do not appear to have been consulted either by court or counsel, so ably and satisfactorily disposed of. We may refer to *Roberts vs. The City of Chicago*, p. 249, where the question arose in regard to the right of the municipal authorities to alter the grade of streets; and to *Chicago, Burlington and Quincy Railway vs. Dewey*, p. 255, where the different degrees of diligence required by either party, under given circumstances, are extensively discussed; as illustrative of what we have just said. The subject of malicious actions and prosecutions is correctly disposed of in *Ross vs. Innis*, p. 259, but the cases are not referred to. They will be found to be numerous. See *Redfield on Railways* 161, 330; 31 Verm. R. 181, and cases cited.

There are some anomalies in this volume explainable upon the ground, we presume, of local usage or special statute. For instance, revising the decisions of inferior Courts in regard to postponing a trial, upon writ of error and bill of exception. *The Bishop Hill Colony vs. Edgerton*, p. 54.

The revising and reversing a former decision of the same Court, on the same facts, in *Smith vs. Moore*, p. 292, is as creditable to the Court, as it is of uncommon occurrence, since it is evident the Court had been misled

in the first decision by a New York case, *Raymond vs. White*, 7 Cow. 321. But the case is not without precedent. It has been done more than once in the Supreme Judicial Court of Massachusetts, under the administration of one of the most enlightened jurists of the age. *Blanchard vs. Page*, 8 Gray's R. 281. We only say that such things are of uncommon occurrence, and not a little embarrassing to those minds who do not feel entirely sure of a firm hold upon public confidence. But when they do occur, they afford the most convincing evidence of the tribunal being more solicitous to do justice than to be highly esteemed by the mass of men, who are more likely to hold a man wise because he never yields an opinion, than because he always admits his liability to err, and sometimes gives the most convincing proof of it, by changing position.

There are some few decisions in this volume which strike us, at first blush, as questionable. In *Sackett vs. Mansfield*, p. 21, and *Myers vs. Kinzie*, p. 36, it is decided, that in deeds of general assignment for the benefit of creditors, to render them fraudulent as to other creditors, the assignee must have been conversant, and have concurred in the corrupt intent of the assignor. This is undoubtedly true of deeds of assignment to parties beneficially interested as creditors and purchasers. But in case of assignments to mere trustees, we question its application. "The intent of the assignor is the material consideration." *Burrill on Assignments* 421. See also *Hildreth vs. Sands*, 2 Johns. Ch. R. 42; *Huguenin vs. Baseley*, 14 Vesey 289, 290; *Bridgman vs. Green*, 2 Vesey 267; *Wilmot's Opinions* 58; Lord Redesdale in House of Lords, 1 Dow Rep. 70; *The Mohawk Bank vs. Atwater*, 2 Paige R. 54, which is precisely in point, to show that the fraudulent purpose of the grantee is not essential to avoid the deed, provided he have no beneficial interest.

The point is twice recognised that a demurrer to pleas in bar will not reach back to defects in the declaration, where there is also a plea of the general issue. This is new to us, and seems inconsistent with principle, but it may be sustained by authority. We doubt it. I. F. R.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF THE UNITED STATES, at December Term 1861. By J. S. BLACK, LL.D. Vol. I. Washington, D. C. W. H. & O. H. Morrison, 1862.

The appointment of Judge Black as Reporter to the Supreme Court of the United States, was one of those now rare occasions on which the merit of the postulant has surpassed the measure of the office. Of his great abilities there could be no doubt, and they had been exhibited in

positions of the highest eminence. Within the scope of a few years he had been successively Chief Justice of his own State, Attorney-General of the United States, and Secretary of State. In each character he had displayed marked capacity, and in the last his courage, firmness, and loyalty were conspicuous at a crisis in our history when these qualities were most needed. The selection of Judge Black for the vacancy caused by the resignation of Mr. Howard, was therefore received with general satisfaction, only mingled with a regret that the office was not more on a level with his public services.

As to the manner in which the duties of Reporter have been performed for several years back, it would be both ungracious and unnecessary now to speak. It is more agreeable to find in the present volume the inauguration of a series which will do credit to the bench and the editor. It has been prepared with that intelligent and conscientious labor which is the chief, though often the least appreciated, duty of a Reporter. The statement of facts, which in cases in this Court must be condensed from documents of more than usual complexity and extent, is, in general, clear, succinct, and intelligible to a noticeable degree. Nothing is inserted which is not necessary to a correct understanding of the decision; and, on the other hand, nothing important to that end is omitted. The arguments of counsel are well reported. The points and authorities are brought out with perfect distinctness, and at the same time, diminished to the proper focus, with due literary skill. There is often, indeed, a freshness and epigrammatical turn in the language used, which shows that the Reporter has not contented himself with a mere reduction by scale, so to speak. The head-notes are accurate and satisfactory, and can be understood at first reading. The index is carefully prepared, and has one characteristic deserving of imitation. The common course is to collect together the syllabuses of the different cases just as they stand, shuffle them, and then deal them out under different heads, as convenience or chance may dictate. Instead of this, Judge Black has, for the purpose of his index, redigested his head-notes into the sharpest and briefest form of which they were capable, so that the eye on running over them can discover on the instant which of them is wanted. There is much saving of time in this, as every one knows who has found the index of a book, like the interpreter of the play, "harder to be understood than the original."

Among the decisions reported in this volume, there are some of much general importance and interest. We have space to refer but to a few.

The case of *Dutton vs. Strong*, p. 23, on the subject of riparian proprietorship on the inland waters, such as Lake Michigan, is of much practical value. So is that of *Johnston vs. Jones*, p. 209, in which the rules as to the apportionment of ownership in the accretions on these lakes, are laid down. The liability of a municipal corporation for private injuries occasioned by the defective construction of a bridge (*Weightman vs. Washington*, p. 39); the right of compensation for an injury produced by several concurrent but not consenting causes (*Steamer New Philadelphia*, p. 62); the duties of a carrier in respect to goods seized under an attachment (*Stiles vs. Davis*, p. 101), how his lien for freight may be waived (*Bags of Linseed*, p. 108), his liability for the inherent defects of an article carried (*Nelson vs. Woodruff*, p. 156), or for its damage in a port of repair (*Brig Collenberg*, p. 70); or, to turn to other topics, the doctrine of the forfeiture of legacies (*Rogers vs. Law*, p. 253), and the character of the interest of partners in a joint stock company trading together in land (*Clagett vs. Kilbourne*, p. 346), are severally discussed and decided in an able manner. One or two constitutional questions deserve notice. The case of the Ohio and Mississippi Railroad *vs. Wheeler*, p. 286, contains an authoritative exposition of the doctrine on the subject of suits by corporations in the Federal Courts, and a novel application of them is made in the decision, that where a corporation obtains separate charters from two or more States (as is often the case with railroad companies), it cannot sue under that joint character in the Federal Courts of either of the States; a result which shows how purely artificial the whole reasoning on this subject has become. In *Rice vs. Railroad Company*, pp. 373, 382, it seems to have been the opinion of all the judges that Congress could not lawfully resume a grant once made any more than a State could, not because it would violate the obligation of a contract, but because whatever was granted had thereby fallen into the domain of private property. Finally, in *Jefferson Branch Bank vs. Shelly*, p. 436, the doctrine that has latterly grown up or received a fresh impulsion in several of the State Courts, that a State cannot *ex vi termini* by any bargain relinquish the right of taxation as a sovereign power, was formally repudiated, and, as far as it can be by the Supreme Court, put at rest. There remains still, however, a good deal to be said on this question.

With these observations on the character and contents of this volume, we commend it to our readers, congratulating them, as well as ourselves, on the great improvement which it exhibits over the former style of reporting.

H. W.

THE
AMERICAN LAW REGISTER.

OCTOBER, 1862.

THE HOMESTEAD EXEMPTION.

(CONCLUDED.)

III.—HOMESTEAD RIGHT—HOW PARTED WITH OR LOST.—The homestead right may be parted with or lost:—

1. *By a Voluntary Sale and Conveyance, duly executed.*
2. *By Judicial Sale under a Mortgage, duly executed.*
3. *By total and absolute Abandonment.*

We will first consider Voluntary Sales and Conveyances.—This subject is regulated by the statutes of the various states. These prescribe the requisites and formalities necessary to make a valid alienation. In order to protect the wife and family, the statutes provide that unless she joins with her husband, any conveyance which he may make will be ineffectual to cut off or affect the homestead right. In some instances any conveyance in which she does not join is declared to be of *no validity* whatever; in others it is declared that such conveyance shall not affect her right or that of the family. To the difference in the special phraseology of the various statutes is to be ascribed much of the apparent conflict in the decisions on this subject.

The homestead right of the family is peculiarly favored by the courts. And hence it may be laid down as a general rule that, to make an operative conveyance of the homestead, or an effectual release or waiver of the homestead exemption, "the mode pointed out by the statute must be strictly pursued." *Poole vs. Gerrard*, 6 Cal. 73; *Vanzant vs. Vanzant*, 23 Ill. 536.

Under a statute which provides that a "conveyance of a homestead by the owner is of no validity, unless the husband and wife (if the owner is married) concur in and sign such conveyance," and that it may "be sold on execution for debts created by written contract, executed by the persons having the power to convey, and expressly stipulating that the homestead is liable therefor," it was held, that a conveyance or mortgage signed by the husband and wife, describing the property by metes and bounds, is sufficient without the fact being *expressly stated that premises were the homestead*. *Babcock vs. Hoey*, 11 Iowa 375 (LOWE, C. J., *dissentiente*).

So under a statute which provides "that no sale or alienation of the homestead shall be valid without the signature of the wife to the same, acknowledged," &c., it was holden not to be necessary to the validity of a mortgage that it should recite or state that the premises were the homestead of the grantors. They are presumed to know what they are granting.¹ *Pfeiffer vs. Reihn*, 13 Cal. 643.

¹ In *Poole vs. Gerrard*, 6 Cal. 71, it was held, under the above statute, that a homestead could only be conveyed by the joint deed of the husband and wife, and that the separate deeds of each were both invalid. *S. P. Dorsey vs. McFarlane*, 1 Cal. 342; 8 Id. 75. See also *Howe vs. Adams*, 28 Verm. 544.

The statute of Illinois provides that "no release or waiver of the homestead exemption shall be valid, unless the same shall be in writing, subscribed by such homemaker and his wife, if he have one, and acknowledged in the same manner as conveyances of real estate," &c. It was held, that a formal release or waiver of the statute must be executed, and that, to make an effectual grant, the wife must do something more than release her dower. *Kitchell vs. Burgwin*, 21 Ill. 40. Explained in 23 Id. 536. The usual form of acknowledgment will bind the husband — but that of the wife must show that the officer taking it fully informed her of her rights under the act, and that she voluntarily released or waived them. *Vanzant vs. Vanzant*, 23 Ill. 536. See further 26 Ill. 107, 150.

In New Hampshire, under a statute limiting the value of the homestead to \$500, and providing that no release or waiver shall be valid unless executed by both ~~husband~~

In those states where the conveyance of the husband without the signature of the wife is of *no validity*, an executory contract or bond of the husband to convey the homestead will not be specifically enforced. It is doubtful whether such a contract would be specifically executed, against the wife's objection, in any of the states where homestead laws exist. *Brurer vs. Wall*, 23 Texas 585; *Yost vs. Devault*, 9 Iowa 60; S. C., 3 Iowa 345. But a *subsequent adoption* of the premises as a homestead is no answer to a bill for specific performance. *Yost vs. Devault*, 3 Iowa 345. The husband alone may defeat such a decree by showing the premises to be the homestead; he is not bound to show that the wife refused to join in the conveyance.

Specific execution might, perhaps, be decreed, if from the acquisition of another home, or from other causes, the premises have ceased to be a homestead. 23 Texas 585.

A contract on the part of the husband to convey the homestead is not void,¹ and damages may be recovered against him for its breach.² 23 Texas 585, *supra*; 9 Iowa 60, *supra*. But a contract to compel his wife to convey would be an unlawful contract. *Ibid*.

SECOND: As to Alienation of Homestead by way of Mortgage.—Much of what is above said in relation to sales and absolute conveyances is equally applicable here, and need not be repeated.

Under a statute which provides that a deed or mortgage of the homestead "shall not be valid without the signature of the wife,"

and wife, it was, notwithstanding, held that a deed by the husband alone is valid, subject to the homestead right to the value of \$500, when such right is demanded by the husband and wife, or wife, or minor children. *Atkinson vs. Atkinson*, 37 N. H. 424; *Horn vs. Tufts*, 39 Id. 478; *Gunnison vs. Twitchell*, 38 Id. 2. See also *Davis vs. Andrews*, 30 Verm. 678, where a similar view is taken, and wife's-right is likened to that of dower. *Howe vs. Adams*, 28 Id. 541; *Sargent vs. Wilson*, 5 Cal. 504; and statutes of these states, *supra*. But see *Richards vs. Chase*, Gray 388; *Williams vs. Starr*, 5 Wis. 584; *Yost vs. Devault*, 9 Iowa 60; *Alley vs. Lay*, Id. 509; *Jenny vs. Gray*, 5 Ohio St. R. 45.

¹ Compare with *Belin vs. Burns*, 17 Texas 582, where it seems to have been considered that a note given by the vendor to the vendee, in consideration of the cancellation of an executory contract to sell the homestead, signed by the husband alone, is invalid and without consideration.

² Suggestion as to damages, 9 Iowa 60, 68; 4 Iowa 1.

a mortgage by the husband alone is not valid even as to him. *Williams vs. Starr*, 5 Wis. 534; *Alley vs. Bay*, 9 Iowa 509. But the benefit of the homestead law will not of course attach to premises which become a homestead *after* the execution of a mortgage as against the mortgagee. *McCormick vs. Wilcox*, 25 Ill. 274; *Yost vs. Devault*, 3 Iowa 345; S. C., 9 Id. 60. It has been accordingly adjudged, in a very recent case, that a junior mortgage of a homestead, executed by both husband and wife, has priority over a senior mortgage executed by the husband alone. And a purchaser at a sale, under the foreclosure of such junior mortgage, obtains a title good against the prior mortgage, although in a suit to foreclose such prior mortgage the husband and wife are made parties and make no defence. *Alley vs. Bay*, *supra*. And such purchaser may maintain a bill to set aside the prior mortgage executed by the husband alone. This doctrine proceeds upon the principle that any other rule "would allow the husband alone the power to obstruct, in advance, the free exercise of the right of alienation belonging to the husband and wife." *Dorsey vs. McFarland*, 7 Cal. 342; same principle, 8 Id. 75.

So, also, under an act providing that "no conveyance by a husband . . . shall be valid unless the wife join," it was held, that a mortgage by the husband alone of the homestead was utterly void, though of far greater value than that allowed by statute.¹ *Richards vs. Chase*, 2 Gray 383.

¹ In other states a different view seems to be taken. Thus, in California, under a statute which declares "that no sale or alienation of the homestead shall be valid without the signature of the wife to the same, acknowledged, &c., and that the homestead shall not exceed \$5000 in value," it is holden that a mortgage executed by the husband alone is valid as to the excess and void only as to the homestead value. *Sargent vs. Wilson*, 5 Cal. 504. Of a similar opinion under their statutes are other courts. See *Atkinson vs. Atkinson*, 37 N. H. 484; *Horn vs. Tufts*, 39 Id. 478; *Gunnison vs. Twitchell*, 38 Id. 62; *Davis vs. Andrews*, 30 Verm. 678; *Hew vs. Adams*, 28 Id. 541; *Stewart vs. Mackey*, 16 Texas 56, 57.

In Texas the constitution provides "that the homestead shall not be subject to forced sale for debts hereafter contracted." "Nor shall the owner, if a married man, alienate the same, unless by the consent of his wife, in such manner as the legislature shall point out." Under these provisions it was held, 1st. That an ordinary mortgage, properly executed both by husband and wife, could not be fore-

It is a logical result of this view that a mortgage upon a homestead, which is *void*, because executed by the husband alone, is not rendered valid by the subsequent death of the wife without children. In such case the *debt* remains good, and if the homestead character of the property is gone, and it becomes, under the statute, liable to creditors, the mortgagee of the husband and the other creditors stand upon the same footing, their rights not being at all varied by reason of the execution of such a mortgage.¹ *Revalk vs. Kraemer*, 8 Cal. 66, 76. But if a prior valid mortgage exists upon the premises at the time they become a homestead, and afterwards a new mortgage is executed by the husband alone to a person who pays off the first mortgage and causes it to be released, the release of the old and the execution of the new mortgage being on the same day, such new mortgage, being in equity treated as an assignment of the first mortgage, is valid, though the wife did not join therein. *Swift vs. Kramer*, 13 Cal. 526.

Before leaving the subject of mortgages upon the homestead, a word may be added as to the mode of foreclosure. The wife is a necessary party to a bill to foreclose. It is error to refuse to

closed in court or the property sold on judicial process, because such a sale would be a "forced sale." *Sed qu.* 2d. That the power to alienate included the power to mortgage, and therefore a mortgage containing a power of sale, on default of payment, would be valid, and could legally be exercised. *Sampson vs. Williamson*, 5 Texas 102; 16 Id. 58. In Minnesota, under the peculiar language of the statute, it was held by a majority of the Supreme Court, (but in our opinion with doubtful correctness,) that the husband alone could execute a valid mortgage upon the homestead. *Olson vs. Nelson*, 8 Minn. 58. But the contrary is now the law by express statute. Laws of 1858, p. 9, § 2.

The Illinois statute protects the homestead "from levy and forced sale under judicial process." Held, that a sale made by a trustee under a deed of trust, was not within the law, and was therefore valid. *Ely vs. Eastwood*, 26 Ill. 107; *Id. Smith vs. Marc*, 150. See, also, as to deeds of trust on homestead. *Stevens vs. Meyer*, 11 Iowa 188.

¹ A different, and perhaps less satisfactory conclusion, appears to have been arrived at in another state, where it is considered that a mortgage on the homestead, not effectual when it is made, may yet become valid and attach as a *lien* by the subsequent abandonment of the homestead and the acquisition of a new one. *Lewart vs. Mackey*, 16 Texas 56.

allow her to intervene and claim the premises as a homestead *Sargent vs. Wilson*, 5 Cal. 504. If she is not made a party her rights are not affected. *Revalk vs. Kraemer*, 8 Cal. 66; *Tadlock vs. Eccles*, 20 Texas 782. If the husband, being made a party, sets up a right of homestead, the court, before decree, should order the wife to be brought in as a party. *Marks vs. Marsh*, 9 Cal. 90. If the husband alone is made a party and defends, his rights are not concluded by the decree, and he may, notwithstanding, join with his wife in a bill to restrain the carrying of the decree into effect. *Revalk vs. Kraemer*, 8 Cal. 66, 74, 75; *Cook vs. Klink*, Id. 347. But where both the husband and wife are parties and in court, a decree determining the property to be liable is as binding as in other cases, and cannot be assailed except for fraud. The question, in such cases, being by the decree *res judicata*, the homestead right cannot again be set up and litigated when an action is brought to recover possession. But it may be, if the wife was not a party to the decree of foreclosure. Where the parents have the right to dispose of the homestead, without consulting the children, whatever decree binds the parents will equally bind the children.¹ *Lee vs. Kingsbury*, 13 Texas 68; *Tadlock vs. Eccles*, 20 Id. 782; *Brewer vs. Wall*, 23 Id. 589; *Beecher vs. Baldy*, 7 Mich. 488.

Exempted property is not rendered subject to levy and sale by general creditors in consequence of being mortgaged. *Collett vs. Jones*, 2 Ben. Mon. 19; *Vaughan vs. Thompson*, 17 Ill. 78.

THIRD: *As to the Abandonment of Homestead.*—We have heretofore seen that, in general, actual residence and occupation of the premises as a home by the family, are essential legal attributes of a homestead. It results from the nature of a homestead, that a man or the head of a family can have but one homestead at the same time. In this respect the homestead right is unlike the

¹ Generally it may be said that in actions to determine or affect homestead rights, the wife should be a party. See cases above, and also *Wiener vs. Farahan*, 2 Mich. 472. The contrary view is alone taken in Iowa. *Sloan vs. Coolbaugh*, 19 Iowa 31. In one state it is held, on the ground that the homestead is the joint estate of the husband and wife, that both must join in ejectment. *Pool vs. Gerard*, 6 Cal. 71; *Taylor vs. Hargous*, 4 Ib. 278.

lower right, which attaches to every parcel of which the husband is seised during the marriage. *Horn vs. Tufts*, 39 N. H. 478, 488; *Howe vs. Adams*, 28 Verm. (2 Williams) 544.

With respect to the abandonment of one home and the acquisition of another, the courts have frequently drawn analogies from the rules in relation to domicil and the change of domicil. It is not to be denied that such analogies are, in many cases, applicable. But, on the assumption that an old homestead may be abandoned before a new one is acquired, the rules in relation to domicil are not entirely pertinent. For the law as to domicil is that every man must have a domicil somewhere, and the original domicil is not gone until a new one is actually acquired, *facto et animo*. Story on Conf. Laws, § 47; *Shepherd vs. Cassidy*, 20 Texas 29; *Walters vs. The People*, 18 Ill. 199; S. C., 21 Ill. 178; *Abbing-ton vs. North Bridgewater*, 23 Pick. 177.

The assent of the wife is not necessary to enable the husband to *select and fix* the homestead. And it has also been decided that the husband alone can *change the homestead* without her assent.¹ *Williams vs. Sweatland*, 10 Iowa 51.

It is agreed that upon the acquisition of a new homestead, though of less value, the homestead right in the former is thereby terminated. *Horn vs. Tufts*, 39 N. H. 478, 488; *Trawick vs.*

¹ There is no objection to investing the husband with the right to exchange one homestead for another. But where, by statute, a sale or conveyance of the homestead without the signature of the wife is of no validity, it would not accord with the nature and design of the homestead policy, to hold that the husband has the right to require the wife to leave the homestead before a new one is acquired. If she leaves, not assenting to the removal, her homestead rights should not be forfeited in consequence. See, on this point, *Taylor vs. Hargous*, 4 Cal. 268; 7 Id. 345; 10 Id. 167, 296; 16 Texas 58, where it is said, that "the wife may refuse to abandon her homestead, or acquiesce in its sale, or other disposition, without provision for another homestead." No good objection is perceived (in the absence of statutory regulation) to holding, on general principles, that the husband may *change the homestead*, by which is meant that, when a new home has actually been obtained, it is the right of the husband, as the head of the family, to require the wife to remove to the new home. As there cannot be two different homesteads at the same time, under the circumstances last supposed, it is probable that the former homestead would lose its character as such, even though the wife might remain in its actual possession.

Harris, 8 Texas 312; *Taylor vs. Boulware*, 17 Id. 74; 16 Id. 58; *Howe vs. Adams*, 28 Verm. (2 Williams) 544; *Taylor vs. Hargous*, 4 Cal. 268. Not only so, but the better opinion would seem to be that a homestead right may be waived or forfeited by *clear and decisive proof of an intention totally to relinquish and abandon it, accompanied by removal from it, even though a new homestead should not be gained*. Any other rule would too much embarrass the condition and rights of property, and open the way to fraud. But it must clearly, and beyond all reasonable ground of dispute, appear that the abandonment was with an intention not to return and claim the exemption. A doubtful or mixed case will not avail to cut off the right. If there be an intention to abandon, such intention may be changed and possession resumed before intervening rights have attached. *Shepherd vs. Cassidy*, 20 Texas 24; *Gouhenant vs. Cockrell*, Id. 96; *Davis vs. Andrews*, 30 Verm. 678.

If the homestead right has once attached it is not indispensable that there should be continuous actual occupation in order to preserve it. The following observations of HEMPHILL, C. J., 18 Texas 417, are well supported by the decisions: "If the citizen or family," says he, "should leave in search of another home, the first would remain until the second should be acquired. If the husband should remove his wife and family into another county and, without providing them a home, should abandon his wife, she might again resume possession of the homestead. And no absence on pleasure or business, and not designed as an abandonment, would work a forfeiture of the right." *S. P. Shepherd vs. Cassidy*, *at sup.*; *Taylor vs. Boulware*, 17 Id. 74; *Walters vs. The People*, 18 Ill. 194; *S. C.* 21 Ill. 178.

Voluntary removal, by a married woman, from the state and domiciliation in another, deprives *her* of the homestead privilege. *Trawick vs. Harris*, 8 Texas 312. But not the children. *Walters vs. The People*, 21 Ill. 178.

So, where the husband, without being joined by his wife, sold the homestead, and removed with his family, including his wife, to another state, where the husband died, the widow has no right of

homestead. *Jordan vs. Godman*, 19 Texas 273. So, upon the same principle, a wife who, *without good cause*, voluntarily abandoned her husband for several years (three or four) prior to his decease, and refused to return, forfeited thereby her claim both to the homestead right and the widow's allowance. *Earle vs. Earle*, 9 Texas 630. But a removal by the family to another place within the same state, for a temporary purpose, will not amount to an abandonment of the homestead. *Moss vs. Warner*, 10 Cal. 296. In *Taylor vs. Hargous*, 4 Cal. 268, on the principle that the wife has an interest in the estate, and that the homestead right can only be conveyed or extinguished by the joint deed of both husband and wife in the manner provided by law, it was held that removal by the husband and wife after a sale in which the wife did not join, was neither an abandonment of the right of homestead, nor evidence of such abandonment. See also 7 Cal. 345; *Dunn vs. Tozer*, 10 Id. 167; *Dearing vs. Thomas*, 25 Geo. 223.

Evidence of a desire to *sell* is not proof of a design to *abandon* the homestead. Thus, where both husband and wife have endeavored to sell the homestead and, failing to do so, removed from it, it was adjudged not to be liable to sale on execution.¹ *Dunn vs. Tozer*, *supra*. And abandonment of the homestead will not be inferred from the fact that the head of the family is in search of another home. *Kitchell vs. Burgwin*, 21 Ill. 40.

IV. WHETHER A JUDGMENT IS A LIEN UPON THE HOMESTEAD.—A question of some considerable importance has several times

¹ It may be remarked that the homestead right is more liberally supported in California than in perhaps any other state. On the principle that the homestead exemption is intended as much for the *children* as for the wife, it is held that abandonment by and adultery of the wife do not defeat the right of homestead or divest the homestead of its character as such. Hence, a mortgage executed subsequent to the wife's elopement, by the husband alone, is inoperative and void. *Lies vs. De Diablar*, 12 Cal. 327; *Walters vs. The People*, 21 Ill. 178. But in Vermont a lease of the home-farm for five years, accompanied with removal of owner, (there being no evidence of an "intention to return to the premises to live, before the expiration of the term, if ever,") were held to forfeit the homestead right in favor of the grantee of the husband alone. *Davis vs. Andrews*, 30 Verm. 678; *Hoitt vs. Webb*, 89 N. H. 158, 483. But it is otherwise where the lease is short and there is an intention to resume possession. *Hancock vs. Morgan*, 17 Texas 582.

arisen as to the effect on the homestead property of the general statutes, making judgments against a debtor *liens* upon his *real estate*. The decisions relating to this subject have been made wholly without reference to each other, and are not harmonious. In Wisconsin a general statute provided that "all judgments in courts of record should be liens on the real estate of every judgment debtor." The homestead act declared that "the homestead should not be subject to forced sale on execution," &c. The act was silent in relation to lien of judgments; contained no provision as to *change* of homestead, and rendered any alienation without the consent of the wife, invalid. Under these circumstances, the majority of the Supreme Court (SMITH, J., *dissenting*) held that a judgment was a lien, and that whenever the homestead ceases to be occupied as such by the debtor's voluntary act, or is aliened by him, the lien of the judgment, which was before suspended, may be enforced by sale on execution. *Hoyt vs. Hine*, 3 Wis. 752. The same conclusion was reached in New York, in *Allen vs. Cook*, 26 Barb. 374. A similar view was taken in Michigan, in which state the Supreme Court seems to have been of opinion that the homestead character of the property would not run with or follow the land, so as to protect it in favor of a mortgagee from a prior judgment as to which, in favor of the mortgagors, it would be exempt. *Chamberlain vs. Lyell*, 3 Mich. (Gibbs) 448. And see *Herechfeldt vs. George*, 6 Id. 456, 469; *Lawton vs. Bruce*, 39 Maine 488.¹

It is submitted with deference that these views are not tenable.

¹ In Minnesota the statute declared a judgment to be a lien on "all the real property of the judgment debtor in the county," &c. Another provision of the statute exempted the homestead owned and occupied by the debtor as a residence, from sale on execution. The homestead statute was silent on the subject of the lien of judgments, and contained no provision for a *change* of homestead. It was held, that a judgment was a lien; that the homestead was exempt from sale only so long as it was occupied by the debtor or his family; and that, upon conveyance by the husband and wife, it ceased to remain exempt, in the hands of the grantee, from sale under a prior judgment against the grantor. *Folsom vs. Carl*, 5 Minn. 333. But by the Act of March 10, 1860, it is expressly provided that a judgment debtor may remove from or sell the homestead without subjecting it thereby to sale on execution.

The homestead being *exempt*, and placed beyond the reach of involuntary judicial sale, it is difficult to see, if the statute is silent on the subject, on what principle a judgment can be said to be a *lien* upon it. Such a construction of the homestead acts is justly open to the criticism of making the "homestead of the debtor his prison." It obstructs or defeats the free exercise of the right of alienation belonging to both husband and wife. That a judgment is *not a lien*, unless the statute expressly so declares, has been determined in Illinois, in a very recent and well considered case. *Green vs. Marks*, 25 Ill. 221. It was accordingly held, under a statute substantially the same as the statutes of New York and Wisconsin, that the owner of a homestead might sell or mortgage it, and the grantee or mortgagee took it free from the lien of a judgment against the grantor. The principle upon which *Dorsey vs. McFarland*, 7 Cal. 342; 8 Id. 75; *Alley vs. Bay*, 9 Iowa 509; *Yost vs. De Vault*, Id. 60, were decided, sustains the correctness of the decision of the Supreme Court of Illinois just cited. Indeed, in Wisconsin, the legislature, after the decision of *Hoyt vs. Hine*, *supra*, interposed by enacting (May 17, 1858) that no judgment in either the Federal or state court should be a lien on the homestead. See also Act of Iowa Legislature, Session 1861-62. The question as to whether a judgment is a lien, the statute being silent, is before the Supreme Court of Iowa, and not yet decided. The decision will doubtless appear in 13th Iowa Reports.

HOMESTEAD RIGHT SUBORDINATE TO VENDOR'S LIEN.—Many of the statutes contain an express provision that the homestead exemption shall not exist as against the claim of the vendor for the purchase-money. But even where there is no such statute the lien or claim of the vendor for the unpaid purchase-money would be preferred to the debtor's right of homestead. *Farmer vs. Simpson*, 6 Texas 303; *Barnes vs. Gay*, 7 Iowa 26; *Dillon vs. Byrne*, 5 Cal. 455; *Shepherd vs. White*, 11 Texas 354; *Montgomery vs. Tutt*, 11 Cal. 190; *Phelps vs. Conover*, 25 Ill. 309; *Stone vs. Darnell*, 20 Texas 14; *Succession of Foulkes*, 12 La. An. 537; 13 Cal. 75

And the vendor's right will be thus preferred even if the old

mortgage given for the purchase-money be cancelled, and a new mortgage on the same and other property, executed by the *husband alone*, be taken to secure the same and another debt. *Dillon vs. Byrne, supra*; *Barnes vs. Gay, supra*; *Swift vs. Kraemer*, 13 Cal. 526.

So, also, on the same principle, where the husband who was residing on the place as a tenant purchased the same, and to enable him to do so borrowed the whole purchase-money from *another* person, and without his wife joining executed a mortgage to secure the money thus borrowed simultaneously with his receiving a deed, the homestead right, notwithstanding the non-joinder of the wife, is subordinate to the mortgage. *Lassen vs. Vance*, 8 Cal. 271.

On a similar principle, where there is a resulting trust, and the trustee holds the legal title in trust for the real owner, the trustee cannot acquire upon the land a homestead discharged of the trust. *Shepherd vs. White*, 11 Texas 346. So a *mechanic's lien*, if the party is by law entitled to a lien, has priority over the homestead right of the owner. *Merchant vs. Perez*, 11 Texas 20. But the husband alone cannot as against the homestead right *enlarge* the demands of the vendor or mechanic by agreeing to pay him more interest than was due by the original contract. *McHenry vs. Reilly*, 13 Cal. 75; 5 Id. 455. And there may be a *waiver* by the vendor of his right which will leave the homestead right paramount. *Phelps vs. Conover*, 25 Ill. 309. But the taking of a new mortgage for the purchase-money does not amount to such waiver. *Dillon vs. Byrne*, 5 Cal. 455; *Barnes vs. Gay*, 7 Iowa 26.

A citation in a note of some cases referring to subjects not properly within the scope of the foregoing article, may prove acceptable to the reader.¹

Davenport, Iowa.

J. F. D.

¹ Homestead acts are without effect as to prior creditors. *Milne vs. Smith*, 12 La. An. B. 558; 10 Id. 509; *Succession of Aaron*, 11 Id. 671; *Simonds vs. Powers*, 28 Verm. (2 Williams) 354; *Grayson vs. Taylor*, 14 Texas 672; *Lawton vs. Bruce*, 39 Maine 484. *Quære*, whether the legislature has the power to exempt the homestead

from liability for antecedent debts? *Charles vs. Lamberson*, 1 Iowa 442. It has not. 1 Denio 129; 8 Id. 594; 1 Comst. 129. See 3 Iowa 287.

When exempt, sale and deed by sheriff are void, and a bill lies to cancel. *Pinkerton vs. Tumlin*, 22 Geo. 165; *Beecher vs. Baldy*, 7 Mich. 488. When the sale is void the sheriff is not liable to homestead owner for damages. *Kendall vs. Clark*, 10 Cal. 17.

Mortgagee of homestead may release the same without affecting his right to participate in the proceeds of a general assignment for the benefit of creditors *pro rata*. *Dickson vs. Chorn*, 6 Iowa 19. The rule that where a creditor has two funds, he may be required to resort to that fund upon which another has no lien, does not apply to such a case. Id.

Marshalling of assets and securities as connected with homestead right. *Beals vs. Clark*, 18 Gray 18; 6 Iowa 19; *Wood vs. Wheeler*, 7 Texas 18; S. C. 11 Id. 122; *James vs. Thompson*, 14 Id. 468; 20 Id. 247.

Sale where value is limited, and appropriation of excess. *Dearing vs. Thomas*, 25 Geo. 223; *Gary vs. Eastabrook*, 6 Cal. 457; *Wood vs. Wheeler*, 7 Texas 18; S. C. 11 Id. 122; 15 Texas 174; *Fletcher vs. State Bank*, 87 N. H. 369. Value as of what date to be ascertained. *Herschfeldt vs. George*, 6 Mich. 456. Bill in equity will lie to determine value, if there is no statutory mode. 7 Mich. 488.

Proceeds, it seems, are not subject to garnishment for the husband's debts, if made payable to the wife, to induce her to sign a deed for the homestead. *Ogden vs. Giddings*, 15 Texas 485. See, as to garnishment of proceeds of exempt property, 27 Verm. (1 Williams) 561; 29 Id. 291, Opinion by RADFIELD, C. J.

Notice of homestead rights. Recorded notice not necessary, unless statute so requires—actual occupation sufficient notice. 4 Cal. 23, 26; 6 Id. 165; 7 Mich. 503, 505. Even when notice to officer is required, it may be verbal, and is sufficient if given after levy and before sale. 7 Mich. 488, 510; 29 Penn. St. R. 362; 3 Iowa 292.

Grantee, and those claiming under him, are bound to take notice of a recital in his grantor's deed in relation to the residence of the grantor upon the premises. 10 Iowa 51.

Head of family, who? *Wood vs. Wheeler*, 17 Texas 18, 20; 11 Iowa 104; Id. 227; 20 Mo. 75; 22 Id. 464; 3 Humph. 216; 17 Ala. 486; 4 Id. 554; 7 Id. 721; 31 Id. 192; 14 Barb. 456; 18 Johns. 400; 8 Cal. 66; 17 Texas 74.

Repeal of Exemption Act. "It is competent for the legislature to take away exemptions, or to require a record of the exemption when none was required before." DREWY, J., 13 Gray 24. See also 11 Richards (Law) 353. But see 4 G. Greene (Iowa) 563, where a questionable reason is given for what, under the general statute of the state saving rights acquired under repealed statutes, is a sound decision. *Helpenstein vs. Gore*, 3 Iowa 287; 23 Texas 498; 14 Id. 672.

Effect of extension of city limits so as to embrace a country homestead. *Taylor vs. Boulware*, 17 Texas 74; *Finley vs. Dietrich et al.*, 12 Iowa 516.

PERPETUAL EXEMPTION FROM TAXATION.

REPORT

OF THE COMMITTEE ON THE JUDICIARY OF THE SENATE OF RHODE ISLAND, ON THE RIGHT OF A LEGISLATURE TO GRANT A PERPETUAL EXEMPTION FROM TAXATION.¹

By resolution of the City Council of Newport, passed on the 4th of March, 1862, their Senator was instructed to endeavor to procure the alteration or repeal of so much of the charter of Brown University, as exempts the property of the president and professors from taxation, the said council stating that in their opinion there was no justifiable reason for such an exemption, especially at a time like the present, when all kinds of property must be necessarily, and probably heavily, taxed for the support of government and preservation of the Union.

On the 5th of March, 1862, the resolution was referred to the committee on the Judiciary for consideration.

At February sessions, 1764, the college was incorporated. The title of the act is, "an act for the establishment of a college or university within this colony."

The section under which this controversy arises is as follows: "And, furthermore, for the greater encouragement of this seminary of learning, and that the same may be amply endowed and enfranchised with the same privileges, dignities, and immunities, enjoyed by the American Colleges and European Universities, we do grant, ordain, and declare, and it is hereby granted, ordained, and declared, that the college estate, the estates, persons, and families of the president and professors for the time being, lying and within the colony, with the persons of the tutors and students, during their residence at the college, shall be freed and exempted from all taxes, serving on juries, and menial services; and that the persons aforesaid shall be exempted from bearing arms,

¹ The following able and comprehensive report, prepared by Mr. Elisha R. Potter, the chairman of the committee, is well deserving the perusal of our readers. The subject is one of great and growing importance.—*Eds. Am. Law Reg.*

impresses, and military services, except in case of an invasion." Subsequently the name of Brown University was given to the institution, in order to commemorate the generous donations of Hon. Nicholas Brown. Two questions present themselves, the power of the legislature to repeal these exemptions, and the propriety of doing so. The former of these questions we will first consider.

We suppose there could be little doubt of the right to repeal it, unless the legislature is restrained by the provisions of the State and United States Constitutions from interfering with it, on the ground that the charter is a *contract* with the corporation.

Since the year 1663, there has always existed a declaration of rights in this State, which was modified and enlarged in 1822, but it contains nothing affecting the present question.

Our present constitution, which took effect in 1843, provides in its declaration of rights, that "All laws should be made for the good of the whole; and the burdens of the State ought to be fairly distributed among its citizens." In section 12 of the same declaration it also provides, that no "ex post facto law or laws impairing the obligation of contracts shall be passed." This seems to have been adopted from the Constitution of the United States, which provides, Art. 1, § 2, that no State shall pass any "ex post facto law or law impairing the obligation of contracts."

The provision about ex post facto laws relates only to criminal or penal legislation.

It seems very strange that the provision about contracts which has become of so much importance, should have been so little noticed at the time of the adoption of the United States Constitution.

The authors of the Federalist (No. 44) barely allude to it. Hamilton in No. 82 says: "With the sole exception of duties on imports and exports, the individual States possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants; and, any attempt on the part of the National Government to abridge them in the exercise of it, would

be a violent assumption of power unwarranted by any article or clause of its constitution."

And nowhere in that work, or in the debates at the time, was the meaning ever given to this clause which was afterwards fastened upon it. It was undoubtedly intended to remedy the evils which had grown out of the paper money system, the legal tender laws, and the various laws interfering with the remedies on private contracts, which had grown out of the distresses of the Revolution. And so Judge TUCKER, whose edition of Blackstone was published in 1803, considers, see vol. 1, Part 1, appendix, "On the Constitution of the United States," page 311. But that a charter was to be deemed a contract, and to be considered irrepealable, was never then imagined. As an evidence of this, we may refer to the fact, that the charters of our two first banks, the Providence Bank and the Bank of Rhode Island, are published among the public statutes of the State, in the Digest of 1798.

And the fact that a charter was not then considered a contract is certainly important. Contemporaneous construction is always allowed to have considerable weight in deciding these questions of construction. The Supreme Court of the United States, in *Briscoe vs. Bank of Kentucky*, 11 Peters 318, say—"A uniform course of action, involving the right of the exercise of an important power by the State government for half a century, and this almost without question, is no unsatisfactory evidence that the power is rightly exercised."

And so great was the mischief caused by the construction put on this clause by the United States Supreme Court, that in nearly all the charters granted after those decisions were made, an express provision has been inserted, making them repealable like all other public acts.

Judge STORY had even gone so far, as to hold that a salary fixed by law was a contract, 4 Wheaton 694.

There is another consideration, which, if the present case should ever come before a judicial tribunal, seems entitled to some weight.

At the time the college charter was granted in 1764, the Legi-

lature of Rhode Island possessed all legislative power, subject only to the provision contained in the charter, that the laws should not be repugnant to the laws of England. With this exception they possessed the full legislative power over all the business and property of the colony.

Was the charter considered a contract at the time it was made? Was it not then taken by the college subject to the repealing power the legislature then possessed? and if it was not a contract then, is it fair to apply to it the provision of the United States Constitution since made?

We shall hereafter quote the opinion of Chief Justice REDFIELD of Vermont, and which will be probably admitted as sound law, that the American legislatures possess all the powers of the British Parliament (subject to the limitations of their constitutions), and that Parliament possessed full power to legislate upon charters and to repeal them at pleasure.

Chief Justice MARSHALL also, in the Dartmouth College case, 4 Wheaton 651, holds the same opinion. "By the Revolution, the duties as well as the powers of government devolved on the people of New Hampshire. It is admitted that among the latter was comprehended the transcendent powers of Parliament, as well as that of the Executive Department. It is too clear to require the support of argument, that all contracts and rights, respecting property, remained unchanged by the Revolution. The obligations then, which were created by the charter to Dartmouth College, were the same in the new, that they had been in the old government. The power of the government was also the same. A repeal of this charter at any time prior to the adoption of the present Constitution of the United States, would have been an extraordinary and unprecedented act of power, but one which could have been contested only by the restrictions upon the legislature, to be found in the Constitution of the State.

Blackstone (in Commentaries, vol. 1, p. 90), says:

"Acts of Parliament derogatory from the power of subsequent legislatures, bind not * * * because the legislature being in truth

the sovereign power, is always of absolute authority; it acknowledges no superior upon earth, which the prior legislature must have been, if its ordinances could bind a subsequent parliament; and upon the same principle, Cicero in his letters to Atticus treats with a proper contempt these restraining clauses which endeavor to tie up the hands of succeeding legislatures. When you repeal the law itself (says he), you at the same time repeal the prohibiting clause which guards against repeal." (*Cic. ad Att.*, lib. 3, ep. 23.) Misquoted in *Bank of Ohio vs. Knoop*, 16 Howard 398.

Of course then, before the Revolution and before there was any constitutional restriction, our legislature had this full power over charters, and the college took the charter knowing this power resided in the legislature, and took it subject to that condition. Even if the charter was a contract, this power to repeal was a part of the contract, it was the condition on which they took the grant of the franchise. If it was a contract, and this condition of repealability was a part of the contract, then the United States Constitution cannot fairly be applied to alter its terms. If it was not considered a contract then, can the provision in the constitution be applied to it at all? And that it was not considered a contract at the time seems not to admit of much doubt. And even when the constitution was made, few of its framers probably ever imagined that a charter could be considered a contract to come within the prohibition. Even Judge STORY seems to admit this, Commentaries, vol. 3, § 1389; and see Judge MARSHALL in *Dartmouth College Case*, 4 Wheaton 644. It is comparatively a new construction, and it may be doubted whether even Judge STORY himself ever supposed the meaning of this clause could be stretched so as to authorize one legislature to grant a perpetual exemption from taxes beyond the power of a succeeding legislature to repeal, for he says in his Commentaries published in 1833, vol. 3, § 1386: "That the framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions adopted for internal government, is admitted, and it has never been so construed."

We cannot very well come to any conclusion upon this subject

without taking a historical view of the cases which have been decided upon this paragraph of the constitution, which forbids any State passing any law impairing the obligation of contracts.

These decisions comprise several classes of cases, and in reading them it may be well to keep in view the distinction between a grant of land, or a regular treaty made by a State, or a law which interferes with a private contract on the one hand, and those laws which profess to yield up a portion of the sovereign power, as the power of taxing, or of taking property for public use, on the other hand. In regard to the first class of cases there can be no doubt; if the State has made a grant of land or an authorized treaty, it ought not to try to recall it. Nor ought they to interfere in a private contract. But the second class of cases stands on an entirely different ground; and we may fairly argue that the people have delegated their sovereign legislative power to the legislature to be exercised, but not to be surrendered; and that the legislature exceeds its power when it undertakes to surrender that trust.

The famous Yazoo case of *Fletcher vs. Peck*, A. D. 1810, was the first important case in the history of these decisions. This was a case where the Legislature of Georgia had granted a tract of land, and then undertook to repeal the grant. But even here Chief Justice MARSHALL makes a distinction. "The principle asserted," says he, "is that one legislature is competent to repeal any act which a former legislature was competent to pass; and, that one legislature cannot abridge the powers of a succeeding legislature." "The correctness of this principle, so far as respects general legislation, can never be controverted. But if *an act be done* under a law, a succeeding legislature cannot undo it. When then a law is in its nature a contract, a repeal of the law cannot divert these rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community." 6 Cranch 135. And, in the same case, Judge JOHNSON, in delivering his opinion, while agreeing in the decision, adverts to the distinction we have mentioned, and seems to have had some foresight of the dangers of the doctrines advanced *Fletcher vs. Peck*, 6 Cranch 143.

Judge JOHNSON.—“I do not hesitate to declare that a State does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things; a principle which will impose laws even on the Deity.

“A contrary opinion can only be maintained upon the ground that no existing legislature can abridge the powers of those which will succeed it. To a certain extent this is certainly correct; but the *distinction* lies between power and interest, the *right of jurisdiction* and the *right of soil*. The right of jurisdiction is essentially connected to, or rather identified with, the national sovereignty. To part with it is to commit a species of political suicide. In fact a power to produce its own annihilation is an absurdity in terms. It is a power as utterly incommunicable to a political as to a natural person. But it is not so with the interests or property of a nation. Its possessions naturally are in no wise necessary to its political existence; they are entirely accidental, and may be parted with in every respect similarly to those of the individuals who compose the community. When the legislature have once conveyed their interests or property in any subject to the individual, they have lost all control over it,” &c.

The next case which is usually quoted in this connection, is *New Jersey vs. Wilson*, 7 Cranch 104, decided A. D. 1812.

The Legislature of New Jersey in 1758, while subject to no constitutional limitations, had made a treaty with an Indian tribe by which they exempted a certain tract of land from taxation. The Court decided that this was a contract the legislature could not repeal. There was no appearance for the State, and the case was not argued at all. Judge CATRON (16 Howard 401) says, that the question of one legislature having the power to abridge the power of the succeeding legislature was not raised there, and Judge PARKER (10 New Hampshire 188) makes the same remark. The taxing power had indeed been surrendered, but it had been done by a treaty made at a time when the State had a right to make such a treaty, which seems to distinguish this case from others.

See the case of *Armstrong vs. Treasurer of Athens County*, 16

Peters 290, in which Judge CATRON comments on this case of *New Jersey vs. Wilson*.

The next cases in order were *Terret vs. Taylor*, 9 Cranch 48, and *Pawlet vs. Clarke*, 9 Cranch 292, decided A. D. 1815. These were cases of grants of land, and the Court decided the legislature had no power to revoke them.

The next case involving the power of State Legislatures as to taxation (but not involving the question of contract), was *McCulloch vs. Maryland*, 4 Wheaton 428, decided A. D. 1819.

The State of Maryland had taxed the United States Branch Bank. It was a conflict of jurisdiction, and the Court decided that the bank was one of the constitutional means of the general government for carrying into effect the powers vested in it, and as such the State had no right to tax it. The sovereign power of the State did not extend to it. We refer to this case principally to quote the language of Chief Justice MARSHALL, showing that he considered the power of taxation as *essential* to the existence of government, and as one of the *incidents of sovereignty*.

Judge MARSHALL.—“It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. * * * The people of a State, therefore, give to their government a right of taxing themselves and their property; and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator and on the influence of the constituents over their representative to guard them against its abuse. * * * It is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a State extends are objects of taxation,” &c.

But the great and leading case on this question, is that of *Dartmouth College*, also decided A. D. 1819, 4 Wheaton 518. *Dartmouth College* was incorporated A. D. 1769, and, in 1816, the Legislature of New Hampshire passed an act altering the charter. to which act the college corporation did not give their assent

The Court here decided that the charter constituted a contract which the legislature could not alter without the consent of the corporation.

On reading the report of this case, one cannot avoid observing the industry and ability with which it was argued by the counsel for the college, and the half-heartedness or want of interest manifested by the counsel for the State. We can only account for it by supposing that the act of the legislature was really so objectionable in its provisions that the counsel did not feel very anxious to defend it; and that the Court, from the intrinsic equity of the case itself, felt a great desire to declare the act void, but in doing so laid down principles of which they themselves could not foresee the possible future applications.

But a few years before this, A. D. 1815, the case of *Portland Bank vs. Apthorp* had been decided in Massachusetts (12 Mass. 252), involving the question of the right to tax the banks for their privileges, and no one thought of referring to this clause of the constitution as having any connection with it.

Several cases have come before the United States Supreme Court, involving questions of taxing property which had been by charter exempted from taxation.

In 1845 the case of *Gordon vs. Tax Court, &c.*, was decided. 3 Howard 144. The corporation had constructed a road, &c., and in consideration of that had been exempted from any further tax. The Court say that the charter was a franchise; that if the corporation had paid a bonus for it, the legislature could not by a tax add to the price of it; they construed the exemption to extend not only to the franchise, but to the *stockholders*. This, in fact, was the question contested. There was no attempt to tax the franchise. Judge CATRON, of the same Court, afterwards (16 Howard 402) says, the only question at issue in it was the construction of the statute, and yet the case is generally quoted as deciding the whole question.

Afterwards, in the case of the *State Bank of Ohio vs. Knoop*. 16 Howard 369, when the charter in question had prescribed a particular rate of tax, the Court held it a contract which the Legis-

lature of Ohio could not alter. But it is to be observed that three of the judges dissented from the decision, and Judge TANEY agreed to it, but not for the reasons given by the majority. At the same time the Court decided the case of *Life Insurance Company vs. Debolt*, 16 Howard 416, involving the right of the Legislature of Ohio to interfere with a rule of taxation prescribed by a charter. The Court did indeed decide the case against the State, but the judges disagreed very much in their reasons for the decision. It might be said that they all dissented.

In the case of the *Providence Bank vs. Pitman*, the same Court, while intimating that an exemption of charter from taxation might be held good, decided there was no exemption in that case, and hold the following language as to the importance of this power of taxation. *Providence Bank*, 4 Peters 561.

“That the taxing power is of vital importance, that it is essential to the existence of government, are truths which it cannot be necessary to reaffirm. They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a State may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it may not exist; but as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the State to abandon it does not appear.”

It has always been considered by many of the members of the bar, that the Supreme Court, in their decision, misapprehended the question in the case. Whose fault it was, it is now of no use to consider.

These are the principal cases decided in the United States Court, affecting the right of a legislature to repeal an exemption from taxation granted by charter; and the remarks we have made may serve to indicate the degree of authority to be attached to them. The judges have never been unanimous upon it, and some of them have delivered very able dissenting opinions.

The cases on this question decided in the State Courts, have

been very differently decided, thus seeming to leave the matter in a very unsettled state. And many eminent members of the legal profession have been of opinion that the Courts have gone too far in holding (so far as they have held) a charter exemption from taxation to be irrevocable.

Professor Greenleaf, of the Law School at Harvard University, gives us his opinion as follows (Greenleaf's Cruise, vol. 3, title 27, § 29, note):—"In regard to the position that the grant of the franchise of a ferry, bridge, turnpike, or railroad, is in its nature exclusive; so that the State cannot interfere with it by the creation of another similar franchise, tending materially to impair its value; it is with great deference submitted, that an important distinction should be observed between those powers of government which are essential attributes of sovereignty, indispensable to be always preserved in full vigor, such as the power to create revenue for public purposes, to provide for the common defence, to provide safe and convenient ways for the public necessity and convenience, and to take private property for public uses and the like; and those powers which are not thus essential, such as the power to alienate the lands and other property of the State, and to make contracts of service, or of purchase and sale, or the like. Powers of the former class are essential to the constitution of society, as without them no political community can well exist, and necessity requires that they should continue unimpaired. They are intrusted to the legislature to be exercised, not to be bartered away: and, it is indispensable, that each legislature should assemble with the same measure of sovereign power which was held by its predecessors. Any act of the legislature disabling itself from the future exercise of powers intrusted to it for the public good must be void, being in effect a covenant to desert its paramount duty to the whole people. It is, therefore, deemed not competent for a legislature to covenant that it will not, under any circumstances, open another avenue for the public travel within certain limits or a certain term of time; such covenant being an alienation of sovereign powers and a violation of public duty." But if a legislature has availed itself of private capital to make a road, they ought not to interfere with the privilege without full indemnity.

Judge REDFIELD (late Chief Justice of Vermont) expresses himself on the subject thus:—"In a late case in the Supreme Court of Vermont (27 Vt. Rep. 140), a doubt is expressed in regard to the entire soundness of the principle of legislative exemptions of corporations from taxation. It may be sound, perhaps, within certain limits, and so far as it can be clearly shown to have formed an essential ingredient in the consideration which induces the corporators to accept their charter and undertake the offices thereby created. If it were apparent that, without the exemption, the company would not have accepted their charter, it might with great propriety be urged that the indispensable condition of its existence should be held inviolable, even by the legislature."

And he goes on to observe, that the opinion of Judge CATRON in *Bank of Ohio vs. Knoop*, the decision of the State Court of Ohio in that case, and of the New Hampshire Superior Court in *Brewster vs. Hough*, that a legislature has no power to grant a perpetual exemption from taxation, seems the "sounder view of the law. And, as we have elsewhere said, we would not be surprised to find hereafter this whole subject of the right of a State legislature to exempt corporations by their charter from taxation brought in question, or, at all events, limited to exemption from special taxation. But the law at present is probably otherwise."

"It seems, too, that upon principle an exemption of this character is not an *essential* franchise of the corporation, and is therefore necessarily temporary in its character," &c. Redfield on Railways 526, note.

In *Thorpe vs. Rutland*, 27 Vermont 140, Chief Justice REDFIELD says, in delivering the opinion of the Court:—

"It has never been questioned, so far as I know, that the American Legislatures have the same unlimited power in regard to legislation which resides in the British Parliament, except where they are restrained by written constitutions. That must be conceded, I think, to be a fundamental principle in the organization of the American States. The people must of course possess all legislative power originally. They have committed this in the most general and unlimited manner to the several State legisla

tures, saving only such restrictions as are imposed by the Constitution of the United States or of the particular State in question.

"It is conceded on all hands that the Parliament of Great Britain is competent to make any law binding upon corporations, however much it may increase their burdens or restrict their powers, whether general or organic, even to the repeal of their charters. * * * And if, as we have shown, the several State legislatures have the same extent of legislative power (with the limitations named), the inviolability of these artificial bodies rests on the same basis in the American States with that of natural persons."

"It has been questioned how far one legislature could in this manner abridge the general power of every sovereignty to impose taxes to defray the expense of public functions. It seems to me there is some ground to question the right of the legislature to extinguish by one act this essential right of sovereignty. I would not be surprised to find it brought into general doubt. But at present it seems to be pretty generally acquiesced in. But all the decisions in the United States Supreme Court, allowing the legislature to grant irrevocably any essential prerogative of sovereignty, require it to be upon consideration, and in case of corporations, contemporaneous with the creation of the franchise. Similar decisions in regard to the right of the legislature to grant perpetual exemption from taxation to corporations and property, the title to which is derived from the State, have been made by this Court (13 Vermont 525; and in some of the other States, 11 Conn. 251, and cases cited; 24 Miss. 386). But these cases do not affect to justify even this express exemption from taxation, being held inviolable, except upon the ground that it formed a part of the value of the grant, for which the State received a stipulated fee or consideration."

This case involved the question of the right of the legislature to pass a law making railroads liable for injuries done to cattle. The Court sustained the law.

A question may arise what are the *essential* incidents of a corporation, which belong to it as such, and form a part of the contract of incorporation. And here Judge REDFIELD quotes Chief

Justice MARSHALL, in the *Dartmouth College Case*, 4 Wheaton, and then goes on to say:—"Certain things it is agreed are essential to the beneficial existence and successful operation of a corporation, such as individuality and perpetuity (when the grant is unlimited); the power to sue and be sued, to have a common seal and to contract, and, in the case of a railway, to have a common stock; to construct and maintain its road, and to operate the same for the common benefit of the corporators. Certain other things, as incidental to the beneficial use of these franchises, are necessarily implied. But there is a wide field of debatable ground outside of all these. It is conceded that the powers expressly, or by necessary implication, conferred by the charter, and which are essential to the successful operation of the corporation, are inviolable." And then he further quotes Judge MARSHALL in the *Providence Bank Case*, 4 Peters 514. "The great object of an incorporation is to bestow the character and properties of individuality on a collected and changing body of men. Any privileges which may exempt it from the burdens common to individuals, do not flow necessarily from the charter, but must be expressed in it, or they do not exist."

The case of the right of *eminent domain*, as it is called, or the right to take private property for public use, seems to be of a kindred nature with the right of taxation—(or rather the right of taxation may be considered as a branch of the right of eminent domain. In both cases private property is taken for public use.) After a long struggle the Courts have decided that, although the charter is a contract, yet the property of the corporation and the franchise itself may be taken by the legislature for public use, on paying compensation, and that this right of eminent domain, a right to take private property for public use, is one of the sovereign powers which one legislature cannot grant away or contract not to exercise.

"A State," says Chief Justice TANEY, "ought never to be presumed to surrender this power (the right of eminent domain), because, like the taxing power, the whole community have an interest in preserving it undiminished." *Charles River Bridge Case*, 11 Peters 544.

In the *West River Bridge Case*, A.D. 1848, 6 Howard. 507, a bridge built under a charter had been taken for a highway. The bridge company relied on their charter being a contract, but the United States Court held that under the right of eminent domain the bridge could be so taken. Judge DANIELS delivered the opinion of the Court:—"No State, it is declared, shall pass a law impairing the obligation of contracts; yet, with this concession constantly yielded, it cannot be justly disputed that in every political sovereign community there inheres, necessarily, the right and duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large. This power and this duty are to be executed, not only in the highest acts of sovereignty and in the external relations of government; they reach and comprehend likewise the interior polity and relations of social life, which should be regulated with reference to the advantages of the whole society. This power, denominated the eminent domain of the State, is, as its name imports, paramount to all private rights vested under the government, and these last are, by necessary implication, held in subordination to this power, and must yield in every instance to its proper exercise.

"In our country it is believed that the power was never, or at at any rate rarely, questioned, until the opinion seems to have obtained that the right of property in a *chartered corporation* was *more sacred* and intangible than the same right could possibly be in the person of the citizen; an opinion which must be without any grounds to rest on, &c.

"These decisions (referring to them) sustain clearly the following positions comprised in this summary, given by Chancellor Walworth (3 Paige 73), when he says that, 'notwithstanding the grant to individuals, the eminent domain, the highest and most exact idea of property, remains in the government, or in the aggregate body of the people in their sovereign capacity; and they have a right to *resume* the possession of the property in the manner directed by the constitution and laws of the State whenever the public interest requires it. This right of resumption may be exercised, not only where the safety, but where *the interest*, a

even the expediency of the State is concerned ! In these positions, containing no exception with regard to property in a franchise (an exception which we should deem to be without warrant in reason), we recognise the true doctrines of the law as applicable to the cases before us.' "

Many other decisions have been made upon this subject of eminent domain, and in favor of the right of the State. In *Babcock vs. Lebanon*, 11 New Hampshire 19, the Court sustained the taking of a turnpike for a highway. The *Charles River Bridge Case*, 11 Peters Reports 420, is one of the most important. Case of the *Northern Railroad*, 7 Foster 183, that one railroad may take the track of another for compensation. In the case of the *Piscataqua Bridge*, 7 New Hampshire 85, the same principle was involved. The case in 2 Denio 474, relates to blowing up a building to prevent the spread of a fire. See also the case of the *Enfield Toll Bridge*, 17 Connecticut 40.

In *Gozzle vs. Corporation of Georgetown*, 6 Wheaton 593, the streets of Georgetown had been graded, and persons had built on the faith of it ; and the right of the corporation to alter the grades was disputed, and it was claimed as a contract and unalterable. The Court, however (Judge MARSHALL giving the opinion), decided otherwise :—" A corporation can make such contracts only as are allowed by the acts of incorporation. The power of this body to make a contract, which should so operate as to bind its legislative capacities for ever thereafter, and disable it from enacting a by-law, which the legislature enables it to enact, may well be questioned. We rather think the corporation cannot abridge its own legislative power."

Does not the reasoning here apply to a State as well as to a city corporation ?

In 1 Foster (New Hampshire Reports) 393, it is decided that a town cannot grant an exemption from taxation.

In *Episcopal Church vs. City of New York*, 7 Cowen 584, the city had conveyed land for burial purposes, and covenanted for its quiet enjoyment. The city afterwards made a by-law prohibiting interments there, and it was held good. See also 5 Cowen 588.

In the State courts a number of cases have been decided of charter exemption from taxation, but not with sufficient uniformity to have much weight attached to them. In some of them the question seems to have been merely a question of construction, and not involving a right to repeal an exemption once granted.

In *Handy vs. Waltham*, 7 Pick. 108, Massachusetts had by statute exempted certain estate of Harvard College from taxes, and the Constitution of the State had confirmed the privileges of the college. The court said the exemption could not be repealed. But this seems to have been a question of construction, and the present question does not appear to have been raised.

In 1839 the case of *Brewster vs. Hough* was decided in New Hampshire. The Legislature had, in 1780, exempted by statute certain lands of Dartmouth College. The case was finally decided on the ground that the exemption was merely temporary. Chief Justice PARKER delivered the opinion of the court: "It may well be doubted, whether the legislature of 1780 could, by any proceeding which they might adopt, make a contract with the citizens of the State for the permanent exemption of any portion of the property lying within the government. * * * That form of government could not from its nature, and the present constitution does not contain any express grant or authority from the people empowering the legislature to make such a contract."

"The power of taxation is essentially a power of sovereignty, or eminent domain; and it may well deserve consideration, whether this power is not inherent in the people, under a republican government; and so far inalienable that no legislature can make a contract by which it can be surrendered, without express authority for that purpose in the constitution, or in some other way leading directly from the people themselves."

"To hold that the legislature cannot make a grant whereby the property shall be exempted from public use, and to hold also that they cannot contract to exonerate the property of the citizens from taxation, and thereby bind future legislatures, by no means indicates an opinion that the legislature have a right to rescind or abrogate grants of land and franchises, or contracts lawfully

entered into by a preceding legislature. The doctrine is well settled, that legislatures may make grants of some kinds, which come properly within the denomination of contracts, and such contracts, when made, are as inviolable as the contracts of an individual."

"It is as essential that the public faith should be preserved inviolate as it is that individual grants and contracts should be maintained and enforced. But there is a material difference between the right of a legislature to grant lands, or corporate powers, or money, and a right to grant away the essential attributes of sovereignty, or rights of eminent domain. These do not seem to furnish the subject-matter of a contract." *Brewster vs. Hough*, 10 New Hampshire 139.

For criticisms on this opinion see American Law Magazine for 1846, Art. 4.

Among the other cases decided in the State Courts on questions of exemption from taxation by statute or charter, are the following: In *Osborne vs. Humphrey*, 7 Conn. 335, a law of 1802 had exempted parsonages, &c. from taxation, and the land had been leased for 999 years. The act was repealed 1821, and the repeal was held void. *Atwater vs. Woodbridge*, 6 Conn. 223, is a similar case. In 11 Conn. 251, is a case of ministry land exempted by statute from taxation, and the exemption was held good. Judge CHURCH, however, dissented, and delivered a very able opinion, reviewing all the cases, and especially commenting on the two cases in 6 Conn. 223, and 10 Conn. 490, in which cases he says this question of the power of the legislature was not raised. 1 Metcalf 538, was a question of exempting meeting houses, but seems to relate to the construction of the act. 4 Metcalf 564, seems also a question of construction. *State vs. Branin*, 3 Zabriskie 484, also relates to the construction of a statute. So in *State vs. Tunis*, 3 Zabriskie. In the case of *Morris Railroad*, 3 Zabriskie 529, the charter was repealable. In the case of the *Easton Bank*, 10 Barr (Pa.) Reports 442, a rate of tax had been prescribed in the charter, but no stipulation that there should be no further tax, and the court upheld the additional tax.

In 13 Vermont 225, ministry land had been exempted by statute, and afterwards leased, and the exemption was held good. In the cases in Ohio—*Debolt vs. Ohio Life Insurance Company*, 1 Ohio 564; *Mechanics' Bank vs. Debolt*, 1 Ohio 581; *Toledo Bank vs. Boyd*, 1 Ohio 622; and *Piqua Branch of State Bank vs. Knoop*, in same volume, the court deny the right of the legislature to grant perpetual exemptions, and sustain their opinion by long and able arguments. In *Ohio vs. Commercial Bank of Cincinnati*, 7 Ohio 125, the rate of tax was fixed in the charter, and the court seem to hold it a contract the legislature could not alter, but Judge CATRON (10 Howard 400), says this was merely a case of construction of a statute, and that the constitutional question was not raised. See also what Judge CAMPBELL says, 10 Howard 413.

It is to be observed, also, that in very few of these cases was the State a party, or concerned in the contest; and in some of them the doctrine of contract is tacitly assumed without argument. As see 17 Conn. 98.

In a recent case, *Pennsylvania Canal Commissioners vs. Pennsylvania Railroad Co.*, decided June, 1857, Chief Justice LEWIS gives a thorough examination of the cases on this question and concludes that, in the absence of any constitutional authority, a State legislature has no power to sell, surrender, alienate, or abridge any of the rights of sovereignty, such as the right of taxation, so as to bind future legislatures, and any contract to that effect is void. Although the court refer as authorities to some of the Ohio cases, which had been reversed in the United States Supreme Court, yet the decision of the Pennsylvania court itself, and the reason they give for it, are entitled to no little weight, and show that the current of legal opinion is beginning to change upon this subject. See 5 Law Register 623. *Redfield on Railways*, § 229, page 581.

There was probably a reason why the courts formerly leaned strongly in favor of protecting corporations against the power of the legislatures. There were comparatively few corporations, and there was a strong popular prejudice against them, and they

needed the aid of the courts to preserve their existence. At the present time there is hardly an individual but is interested in some corporation, and it is rather the legislature which needs protection against the influence of combined corporations.

If a legislature can irrevocably exempt a corporation from taxation, they can do the same with a town. For services to the State they might exempt an individual, and his descendants, forever. For a sum paid down by way of commutation, they might exempt an individual, or a city, forever—or, they may exempt a part of the land in a town forever.

Have the people ever given them such a power?

In many cases the courts have sustained acts of legislatures, which divested rights of individuals. "It is clear, says Chief Justice TANEY, "that this court has no right to pronounce an act of the State Legislature void, as contrary to the Constitution of the United States, from the mere fact that it divests antecedent vested rights of property.. * * * Nor are we aware of any decision of this, or any Circuit Court, which has condemned such a law upon this ground, provided its effect be not to impair the obligation of a contract." *Charles River Bridge Case*, 11 Peters 540.

We have remarked that Judge STORY went so far as to consider salary fixed by law, a contract the legislature could not alter, the courts have since decided to the contrary. See 8 Howard 63; 10 Howard 395; 6 Howard 548. So it has been decided, the legislature may release a penalty although the informer may have an interest in it: 10 Wheaton 248; 6 Peters 404. It is difficult to see the distinction between these cases and those where an exemption from taxation is claimed by virtue of a repealed statute. The case of a charter, however, it would be contended by some, did not stand upon the same ground.

The charter of the college was granted at a time when the people of the State had, comparatively, little wealth, and when salaries were small, professors poor, and, even with the exemption from tax, the professor's salary did not more than comfortably

support him. Circumstances have changed, and professors are now among our most wealthy men.

For several years the college had no professor, and for twenty years they had but one professor. The president's salary was a mere trifle.

Even if the charter is to be considered a contract, it would be full compliance with the spirit of the contract to exempt \$0,000 worth of property from taxation; that being the amount usually held by professors in old times.

According to the letter of the charter an officer may hold any amount of property in trust for others. And the danger of *secret* trusts may be great hereafter. If the present officers are above suspicion, there is no harm in it, and it implies no disrespect to them, to guard against the future.

Some of the committee were of opinion that it would be better, as a mark of respect, and as the legislature do not wish even to appear to do anything to the injury of the college, to make the act conditional, and to request the consent of the corporation to it. If they refused, it would still be in the power of the legislature to repeal the exemption unconditionally. But the majority of the committee think best to report the bill unconditionally, having full confidence in the patriotism of the officers of the college, and not doubting but that they are willing, especially in a crisis like the present, to bear their just share of the burdens of the State.

The committee do not mean to say that the legal question is free from all difficulty, but they believe the courts will hesitate long before they deny the power of the legislature to interfere in the present case.

They respectfully report the following bill :

AN ACT to amend the charter of Brown University by repealing so much thereof as exempts the estates, persons, and families of the president and professors thereof from taxation.

Whereas, in times of public danger all persons ought to bear their share of the public burdens in proportion to their ability, and this General Assembly have full confidence in the patriotism of the said president and professors, and in their

willingness to bear their proper share of the taxation necessary for the preservation of our Union and Constitution, therefore

It is enacted by the General Assembly as follows:

So much of the act entitled "An act for the establishment of a college or university within this colony," passed at February session, A. D. 1764, as exempts the estates, persons and families of the President and Professors of said institution, now known as Brown University, from taxation, is hereby repealed.

NOTE.—It will be seen that this bill does not affect at all the college property, but only that of the college officers. Even on the ground of contract it can be hardly supposed that the exemption of the officers was one of the essentials of the charter, without which the college would not have accepted it.

In the Supreme Court of Vermont—January Term for Chittenden County 1862.

JOHN W. TRACY vs. ALONZO ATHERTON *et al.*

A right of way cannot arise from mere necessity, independent of any grant or reservation, express, or implied as in the case of a former unity of ownership.

This was an action of trespass *qu. cl.* The defendants pleaded in justification a right of way of necessity from the close occupied by them, over the plaintiff's close, to the public highway; the plaintiff's close lying between theirs and said highway; averring that at none of the said several times when, &c., could the defendants have access to their said close from said highway, or egress from their said close, to said highway, or to any other highway or public place, except over and across the close of the plaintiff, without going a greater and more inconvenient and an unnecessary distance, and over and across the closes of other persons; and therefore, that the defendants had, at said several times, when, &c., necessary way for themselves, &c., and alleging the trespasses complained of to be the passing and repassing of the defendants upon said necessary way, as they lawfully might, &c. There was no averment of any former unity of ownership or possession of said closes, nor of any right by prescription. The plea was answered by a general demurrer. The county court, *pro forma*, ad

judged the plea sufficient. To this exception was taken, and the case carried thereon to the Supreme Court.

The case was argued by *M. L. Bennett*, for plaintiff, and *G. F. Edmunds*, for defendants.

The opinion of the court was delivered by

BARRETT, J.—The plea justifies the alleged trespass, on the ground of a right in the defendants of a *way of necessity*, a right created by the necessity, and in no manner derived from *grant*, *reservation*, or *prescription*. The cases are numerous in which a *way of necessity*, as it is called, has been upheld; but in most instances, it has been on the ground of a grant or reservation implied from the necessity. There are some cases in which the reason assigned for the decision seems to favor the idea that a right of way may be *created* by the necessity, irrespective and independent of any *grant* or *reservation*, either express or implied. The one most directly to this effect is *Dutton vs. Taylor*, 2 Lutw. 1487. That case, in its facts, falls within the principle announced by the Court in deciding *Clark vs. Cogge*, Cro. Jac. 170, viz.: “If a man hath four closes lying together, and sells three of them, reserving the middle close, and hath not any way thereto but through one of those which he sold, although he reserved not any way, yet shall he have it, as reserved unto him by the law.” The case of *Chichester vs. Lethbridge*, Willes Rep. 71, cited by counsel for the defendants, does not sustain the doctrine involved in the reason assigned for the decision in *Dutton vs. Taylor*, viz.: “that the public good required that the land should not be unoccupied.” It was, under the 2d count, which alone was sustained, a case of *prescription*, in which the necessity was needlessly alleged as showing the origin of the *user* that had ripened into a right by *prescription*.

The case of *Clark vs. Cogge*, *supra*, which was also cited by defendants’ counsel, was the ordinary one of an implied *grant* of a way. *Howton vs. Frearson*, 8 T. R. 50, was put on the same ground by Ld. KENYON, though counsel urged the right, upon the

principle and authority of *Dutton vs. Taylor*. The ground on which the decision in *Howton vs. Frearson* was put, in connection with the remarks of Ld. KENYON, casts a cloud upon the soundness, if not upon the authority, of the decision for the reason assigned in *Dutton vs. Taylor*. He says, "even upon the general ground, I was prepared to submit to the express authority of the case in *Lutwich*, though I cannot say that my reason has been convinced by it. There are great difficulties in the question; but in the other mode of considering the case" (viz.: as an implied grant), "those difficulties are gotten rid of altogether, and it falls within all the authorities, which are not controverted, even by the plaintiff."

In 1 Saund. 323 a, note 6, the cases are collated, and the doctrine educed is, that a *way of necessity*, such as the law recognises, results either from a *grant* or *reservation*, implied from the existing necessity, and that unity of possession at some former time appears to be the foundation of the right.

In *Bullard vs. Harrison*, 4 M. & S. 387, the third plea was, in substance, the same as the one now under consideration; and after full argument, Lord ELLENBOROUGH, with some spirit and great point, says: "Then as to this being well pleaded as a way of necessity, it is pleaded without showing any unity of possession or prescription whereby the land over which the way is claimed became chargeable. * * * It seems to suppose that whenever a man has not another way, he has a right to go over his neighbor's close. But this is not so," &c. He then refers to note 6 in Saunders 323 a, as containing the law of the subject and manner of pleading a way of necessity very accurately detailed; and saying "it is a thing of grant," &c.

In *Proctor vs. Hodgson*, 29 E. L. & E. 453, in the Court of Exchequer, the subject is involved and discussed; and the doctrine in the note on 1 Saunders 323 a, and as held by Lord ELLENBOROUGH in *Bullard vs. Harrison*, is asserted and applied by the Court. The same view of the law is explicitly stated in Woolrych on the Law of Ways, 72 note q., as well as in Gale & Whatley on Easements, upon a review of all the cases, p. 53 *et seq.* See also Woolrych, pp. 20-21.

The doubt expressed in Hammond's N. P. 198, as to the doctrine of that note in Saunders, would seem to be quieted by the authorities above cited.

Whatever may be the tendency of some of the cases, including that of *Dutton vs. Taylor*, the review we have given shows that the law of the subject is, for the present, settled in England.

So far as we have been referred to, or have been able to examine cases in this country, they seem to be uniform in holding or countenancing the doctrine that now prevails in England. In *Nichols vs. Luce*, 24 Pick. 102, the subject was fully discussed, and the cases were reviewed by counsel, and in the opinion of the Court delivered by MORTON, J., who says, "The deed of the grantor as much *creates* the way of necessity, as it does the way by *grant*. The only difference between the two is, that one is granted by *express words*, and the other only by *implication*. * * * It is not the necessity which creates the right of way, but the fair construction of the acts of the parties. No necessity will justify an entry on another's land," &c.

In *Collins vs. Prentiss*, 15 Conn. 39, the subject was thoroughly considered, and the leading cases were cited. WAITE, J., states the law, in substance, as it is stated in the *note* in Saunders, cited *supra*, and remarks, "And although it is called a way of necessity, yet in strictness the necessity does not create the way, but merely furnishes evidence as to the real intention of the parties." The same case came before the court again, and is reported 15 Conn. 423. The Court say, "A way of necessity can only be created in lands *owned* by the grantor at the time of the conveyance, and must be either reserved in the lands conveyed, for the benefit of the grantor, or created in other lands of the grantor for the benefit of the grantee. It arises from a fair construction of the deed as to the presumed intent of the parties. And it affects nobody but the parties to the deed and those claiming under them."

In *Seeley vs. Bishop*, 19 Conn. 184, ELLSWORTH, J., says, "In the case of *Collins vs. Prentiss*, 15 Conn. 39, this Court recognised fully, and to as great an extent as any other court, the doctrine of a way of necessity." The case of *Pierce vs. Selleck*, 18

Conn. 321, cited by defendants' counsel, does not present any view of the law different from, or in any way modifying the doctrine stated and held in *Collins vs. Prentiss*. In *Brice vs. Randall*, 7 Gill & Johns. 349, it is held that the fact that a person has no right of way except over the defendant's land, is not, of itself, sufficient to give him a right of way from necessity.

Chancellor Kent, 3 Com. 423-4, after referring to various English cases, states the doctrine contained in Sergeant Williams' note, cited *supra*, and says, "This would be placing the right upon a reasonable foundation and one consistent with the general principles of the law:" 3 Cruise Dig. 37. In a learned note by Professor Greenleaf, it is said, "But necessity alone, without reference to any relations between the respective owners of the land, is not sufficient to create this right." He then cites *Bullard vs. Harrison*, Sergeant Williams' note, Woolrych on Ways, and Kent's Com., as they are cited *supra*.

From this reference to the American cases and books, it appears that the law of the subject as now held in England, is received and adopted in this country to a sufficient extent to warrant the Court in adopting the same doctrine, so far as it is applicable, in this case. Indeed, if the question were now resting in general principles, unaffected by the discussions and decisions to which reference has been made, we should be very slow to hold that the necessity of a landowner, for a convenient way to and from his land, would *create* in him the right to encumber the land of a contiguous owner with the servitude of such way, independently of some former unity of ownership of the two parcels, and the implication of a grant or reservation of such right, and independently of any right established by prescription.

If this right, as claimed by the defendants in this case, were to be put on the ground of the requirements of the public good, as was done in assigning the reason for the decision in *Dutton vs. Taylor*, it might with propriety be suggested, whether the constitutional provision as to taking private property for public use without compensation, would not challenge consideration as a conclusive objection to the claim.

The provisions of the Statute for *pent* or bridle roads, seem to

have been made to answer to all the real necessities for a way, such as is claimed to be needed in this case, and at the same time to yield a due regard to the principle and spirit, as well as to the letter of that provision of the constitution.

On the whole, we are satisfied that the plea cannot be sustained either upon principle or authority.

The judgment is therefore reversed.

We are indebted to the courtesy of Mr. Justice BARRETT, for the foregoing very satisfactory opinion upon the question of "right of way of necessity." The learned judge has gone so thoroughly

into an examination of the cases upon that point, that we should scarcely feel justified in occupying any more space.

L. F. R.

In the Supreme Court of Iowa.

TRUSTEES OF IOWA COLLEGE vs. RICHARD B. HILL.

Where L. executed and delivered to H. four blank promissory notes, and authorized him to fill the blanks with sums not exceeding \$5000 each, for the purpose of negotiating them for the benefit of L.; and H. delivered to L. similar notes, to serve as receipts, or to indemnify him in case he (H.) should misuse any of the funds arising from the negotiation of L.'s notes; and H. returned the notes executed by L. to him with the blanks unfilled; and one of the notes executed by H. was filled by L. with the sum of \$8629.81, and passed to the plaintiffs by indorsement as collateral security for an antecedent debt, it was held, that the court did not err in instructing the jury:

1. That the *onus* of showing the consideration of the note was upon the maker, the presumption being that it was sufficient.
2. That if the indorsees were *bonâ fide* holders for a good consideration, it could make no difference that it was executed in blank, or that it was accommodation paper which had been misused by the indorser.
3. That if the transaction was an exchange of notes, the indorsee could not be defeated by showing that, subsequent to the transfer, H. had delivered up and cancelled the notes of the indorser.
4. That if H.'s notes were delivered merely to stand as receipts to protect L. in case H. should misuse the funds arising from the notes given to him to negotiate, any note filled up by L. (his notes having been returned to him) would in his hands be without consideration.

- . That the presumption was that the indorsee took the note in good faith, in the usual course of business, before its maturity, and for a valuable consideration; that express or actual notice that the note was without consideration, or that it had been filled up without authority, was not necessary; that it is sufficient if the circumstances brought home to the plaintiffs are of such a strong and pointed character as necessarily to cast a shade upon the transaction and put them upon inquiry; that the indorsees are not charged with notice because of any want of diligence on their part in making inquiry, or if they took the note under suspicious circumstances, provided they had no notice actual or constructive of the equities between the original parties; that the defendant was not bound to prove that the plaintiff purchased with full and certain knowledge of the want of consideration, but if the circumstances attending the transfer of the note were such as to put them on their guard, or if they must have known therefrom that the person offering it had no right to transfer it, then they were bound to make inquiry, and if they did not, they took the note at their peril.
5. That though the plaintiffs took the note as collateral security for an antecedent debt, they are nevertheless *prima facie*, though not *conclusively*, to be considered as holders for value, and it is on the defendant to show that they are not such holders; that if it was taken for collateral security only, the plaintiffs parting with nothing, giving no time, relinquishing no right, nor suffering damages or injury as the consideration or in consequence of receiving it, they would not be such holders.

Appeal from Scott County District Court.

James Grant, S. F. Smith, and F. F. Burlock, for the appellant.

Davison & True and James J. Lindley, for the appellee.

WRIGHT, J.—This case has been very fully argued by counsel: seldom have we found one more so. We have examined it with great care, and now proceed to state our conclusions without much elaboration of the points made.

Three questions of fact, under the instructions of the Court, were presented for the determination of the jury: 1st. Was the note obtained without consideration? 2d. Had the plaintiffs notice of this before taking the same? 3d. If they had not this notice, did they take it for value in the due course of trade? It is manifest that the jury must have found for the defendant upon the first question; for this determined in favor of the plaintiffs would have entitled them to a verdict. It is equally clear that

their finding must have been in favor of the defendant upon one or both of the other issues. The first, and either of the others, if decided in favor of the defendant, entitled him to a verdict. Whereas, a contrary result as to the first, or that found for the defendant, and the other two against him, would have compelled a verdict for plaintiffs.

What was the consideration, then, was the first material inquiry. Briefly, the defendant claims that at the time the note was given, he, a resident of Davenport, was about to visit Boston; that Lambrite called upon him, and left four blank notes signed by said Lambrite, which defendant had the privilege of filling up, in sums not to exceed \$5000 each, for the purpose of negotiating the same in Boston for the benefit of said Lambrite; that after the notes were thus signed and delivered, the defendant, at his own instance, handed to Lambrite four similar blank notes, including the one now in suit, to serve as a receipt or to indemnify him in case the defendant should misuse any of the funds that might be raised on Lambrite's notes; that he never used the notes obtained from Lambrite, but on the contrary returned the same to him, without ever having filled them up; that Lambrite filled up one of the notes thus signed by the defendant, with the sum of \$8629.81, and passed the same to the plaintiffs. On the part of the plaintiffs, it is claimed that the transaction was an exchange of notes, each party having the right to fill up and negotiate the paper thus delivered, and thus raise money for himself. To support these respective claims, the parties introduced a very great amount of testimony, after considering all of which, the jury found for the defendant. And to sustain this finding, we think the testimony is most abundant. That it was ever intended by the parties that Lambrite should use the blanks delivered to him, except to indemnify himself should the contingency arise, we do not for one moment believe. We are equally clear that Lambrite never intended to thus use them, and that he only concluded in an evil hour to thus use the defendant's name, to do what was at most but partial justice to the plaintiffs, whose funds, which had come into his hands as treasurer, he had used, and which he

hoped to be able to replace, and redeem the note without the negotiation being known to Hill. Nor do we think any just exception can be taken to the instructions on this subject. The *onus* was on the defendant. The presumption was that the consideration was right in every particular, and it was incumbent on the defendant to rebut this presumption. If the plaintiffs were *bond fide* holders for value, then it could make no difference that the note was signed in blank; nor that it was accommodation paper merely, and had been misused by Lambrite. If the transaction was an exchange of notes, then so far the plaintiffs could not be defeated by showing that subsequent to the transfer, the defendant had delivered up and cancelled the notes of Lambrite. If, however, the notes of Hill were delivered not as accommodation paper, but merely to answer in the place of a receipt or receipts, or to protect Lambrite in case Hill should misuse the funds arising from the notes delivered to him to negotiate, any note filled up by Lambrite (his notes not having been used) would in his hands be without consideration. All this was stated to the jury, and substantially and correctly covered the whole law of the case touching the question of consideration. Nor was there any error in refusing those asked by the plaintiffs upon the same subject. In the first place, so far as applicable, they were covered by the instructions in chief. In the next place, while some of those asked and refused, as abstract propositions, were good law, the giving of them could have answered no good purpose under the testimony submitted. We take occasion to say what we have frequently repeated—that a court is not bound to repeat an instruction previously given. Nor should an instruction be given, which, though abstractly correct, is not pertinent to the actual facts developed on the trial.

II. Did the plaintiffs take the note with notice? With the question of fact here involved we have nothing to do, more than to say that if the jury found in the affirmative, we should entertain very many doubts of the correctness of the verdict. As the discussion of this question, however, will be immaterial, from the final view we shall take of the case, we shall confine ourselves to

the law governing it as given by the Court. The jury were told that the presumption was that the plaintiffs took the note in good faith, in the usual course of business, before its maturity, and for a valuable consideration; that express or actual notice that the note was without consideration, or that it had been filled up without authority, was not necessary; that it was sufficient if the circumstances brought home to the plaintiffs were of such a strong and pointed character as necessarily to cast a shade upon the transaction, and put them upon inquiry. They are not to be charged with notice because of any want of diligence on their part in making inquiry, or even if they took the note under suspicious circumstances, provided they had no notice, actual or constructive, of the alleged equities existing between Lambrite and Hill. That the defendant was not bound to prove that the plaintiffs purchased with full and certain knowledge of the want of consideration, but if the circumstances attending the transfer of the note were such as to put them on their guard, or if they must have known therefrom that the person offering it had no right to transfer it, then they were bound to make inquiry, and if they did not, they took the note at their peril. Other instructions bearing upon this question, referring more in detail to the facts developed, were given, but the foregoing will serve to show the general view of the law, taken by the Judge trying the cause. To these we do not think the plaintiffs can have any just ground of exception. As sustaining them, see *Kelly vs. Ford*, 4 Iowa 140; *Clapp vs. Cedar County*, 5 Id. 58; *Story on Notes*, § 197; *Cole vs. Baldwin*, 12 Pick. 546. In this connection the appellants insist that certain instructions were erroneous, for the reason that they were based upon a state of facts of which there was no testimony. We recognise fully the rule that it is erroneous to instruct upon a hypothetical state of facts of which there was no evidence: *Moffitt vs. Crumbe*, 8 Iowa 122; *United States vs. Brentling*, 20 How. 252. But the rule has no application in this case, for the reason that in one instance the instruction was clearly applicable, and as to the other the appellant clearly mistakes the language used by the Court. Thus we should be very far from holding that there was no testimony as to

Lambrite's insolvency at the time of the transfer. On the contrary, we think they would have been fully justified in finding him notoriously so. This is certainly the impression the testimony makes upon our minds. And then, as to the other instruction, the objection is, that the jury were told that notice to one agent is notice to another, whereas, the instruction given is, that notice to the agent of matters coming within the purview of his agency was notice to the principal. In this part of the case, therefore, there was no error in the action of the Court.

III. The question of most importance, and that most discussed by counsel, arises under the third branch of the case. As already suggested, it is claimed by defendant, and the evidence tends to prove, that the plaintiffs received this note from Lambrite as collateral to secure a pre-existing indebtedness, and upon this subject the Court instructed that though the plaintiffs took the note as collateral security for an antecedent debt, they were nevertheless *prima facie*, though not conclusively, to be considered holders for value, and it is on the defendant to show that they were not such holders. Other instructions on the same point were given, and some asked by the parties refused, which, however, need not be recited, for if the foregoing is law, it in our view renders the consideration of all the others unimportant, and the same is true if it is not the law.

Two propositions are said, by Justice STORY, to be laid up among the fundamentals of the law, and to require no authority or reasoning to support them. The first is, that a *bona fide* holder of a negotiable instrument for a valuable consideration, without notice of facts which imperil its validity as between antecedent parties, if he takes it by indorsement before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although as between the antecedent parties the transaction may be without any legal validity. The second is, that the holder of negotiable paper taken before it is due, is not bound to prove that he is a *bona fide* holder for a valuable consideration without notice, for the law will so presume in the absence of all rebutting proofs, and therefore it is incumbent on the defendant

to overcome, by satisfactory proofs, the *prima facie* title of the plaintiff: *Swift vs. Tyson*, 16 Peters 1. But, as applied to this case, the question remains, What constitutes a valuable consideration, under the general rule applicable to negotiable instruments?

It was held in this Court, in *Johnson vs. Baur*, 1 Iowa 531, as settled by the current of decisions, that the rights of the holder of negotiable paper are the same, whether the debt for which it is transferred is pre-existing or contracted at the time. This, of course, referred to a case where the instrument was taken in satisfaction or payment of a pre-existing debt; for, by reference to the case, it will be found that while the question of the rights of a holder who takes the paper as collateral security on a previous liability was discussed by counsel, it was not decided, as the case was disposed of on another point. At that time, however, the question was very elaborately discussed by able counsel, and the writer of this opinion, who is the only member of the present bench who heard the argument, concurred with those authorities which held in accordance with the instructions given in this case. He has serious reason to change the view then entertained, and this being the opinion of the other members of the Court, is so held. Authorities upon the subject are to be found, perhaps, in every state in the Union except our own, to say nothing of the adjudications in the Federal Courts, and those of England.

The most casual reader must be struck with the number of times the question has been determined without really arising. If the evils resulting from an indulgence in mere *obiter dicta* were ever apparent, they are peculiarly so in this instance.

Taking it for granted that taking the note in payment, and as collateral security merely, were the same in principle as affecting the rights of the assignee, cases of the first character are decided, and there it is announced, without the least necessity or occasion for it, that the same rule applies to the second. And well might Justice CATRON, in the leading case of *Swift vs. Tyson*, *supra*, say that what is incorporated in the principal opinion on this subject was aside from the case made by the record, or argued by counsel.

The same thing occurs in effect in *Bond vs. Central Bank*, 2

Kelley 106, and based upon the reasoning there used to a great extent. NESBIT, J., decided the case of *Gibson vs. Conner*, 8 Id. 47. So in *Allaine vs. Hartshorne*, 1 Zab. 665.

The note was transferred for a consideration then advanced in part, and though the question as applied to collaterals did not arise, it was discussed and decided. The case in 11 Ohio 172 is clearly one of payment, and all that is said about collaterals is *obiter*, and nothing else. So, again, the case of *Blanchard vs. Stevens*, 8 Cush. 162, required nothing more than the recognition of the principle that the receiving of the note in payment of a pre-existing debt will exclude all equities between the original parties, and thus we might in almost numberless cases show the truth of the general remark above made. But these will suffice. Some cases are found where the question under discussion fairly and legitimately arose, and was decided as claimed by the appellants. Of this character is the case of 3 Kelley, *supra* (but see *Mealon vs. Bird*, 22 Georgia 246), *Bank vs. Carrington*, 5 R. I. 515, and some others, referred to by counsel. The case of *Bank vs. Chapin*, 8 Metc. 40, does not, in its facts, come clearly within the rule. The debt for which the note in suit was pledged was not a pre-existing debt.

But, without further reference to these cases, we conclude that the correct rule is found clearly stated in *Roxborough vs. Meesick*, 6 Ohio St. R. 448, thus: "Where the note is transferred as collateral security, and for value such as a loan or further advancement, or a stipulation, express or implied, of further time to pay a pre-existing debt, or the like, the assignee will be protected from infirmities affecting the instrument before it was thus transferred. If, however, the note is transferred as collateral security to a pre-existing debt, without any consideration, so that the transfer is a mere voluntary act on the part of the debtor, and is received by the creditor without incurring any new responsibility, parting with any right, or subjecting himself to any delay or loss, and leaving the subsisting debt precisely in the condition it was before such transfer, the holder has not taken the note for value, nor in the usual course of trade." "To hold otherwise," says Judge SWAN,

in that case, "would be a departure from the established rules of law, governing the rights of parties to negotiable paper, and losing sight of public policy, upon which the law is founded."

And the annotator's note to *Swift vs. Tyson*, 1 Am. Lead. Cases 336, states this rule substantially as one that may be considered as settled, and to support it refers to cases in Pennsylvania, Connecticut, Maine, New Hampshire, Ohio, Kentucky, Illinois, Alabama, Michigan, and Delaware.

Affirmed.

Where an instrument in the general form of a bill of exchange or promissory note, but with a blank for the amount to be paid, is delivered by the apparent drawer or maker to the payee or other person, with authority to negotiate it after filling the blank up to a certain sum, it becomes, when so filled up, a valid note or bill by relation, and it will bind the maker in the hands of a *bona fide* holder for value, though a greater than the stipulated sum has been fraudulently inserted. The same rule applies to the indorser of a note in blank. *Russell vs. Langstaffe*, 2 Douglas 514; *Collis vs. Emmet*, 1 H. Black. 818; *Young vs. Grote*, 4 Bingh. 257; *Roberts vs. Tucker*, 16 Q. B. 560; *Russell vs. Perkins*, 25 L. J., C. P. 187; *Bank of Ireland vs. Trustees of Evans' Charity*, 5 H. Lds. Cas. 410; *Violett vs. Patton*, 5 Cranch 142; *Putnam vs. Sullivan*, 4 Mass. 45; *Mitchell vs. Culver*, 7 Cow. 387; *Moody vs. Threkeld*, 13 Geo. 55; *Bank of Limestone vs. Penick*, 5 Monr. 25; *Bank of Commonwealth vs. Curry*, 2 Dana 142; *Smith vs. Moberly*, 10 B. Monroe 266; *Huntington vs. Branch Bank*, 3 Ala. 186; *Kimber vs. Lytle*, 10 Yerg. 417; *Young vs. Ward*, 21 Illinois 228; *Ives vs. Farmers' Bank*, 2 Allen, Mass. 241. In *Young vs. Grote*, 4 Bing. 257, this doctrine was carried so far that it was held that where an agent authorized to fill up a check to a certain amount, does it so carelessly as to leave

a blank before the true amount, and a greater sum is fraudulently filled in by the holder, as *three hundred and fifty* for — *fifty*, the maker was liable for the greater sum. This case has been a good deal commented on, but seems, to the actual extent of the decision, to be followed in England. See *Roberts vs. Tucker*, 16 Q. B. 560; *Bank of Ireland vs. Trustees, &c.*, 5 H. Lds. 410; *Ex parte Swan*, 7 Com. B. 400. But in *Worrall vs. Gheen*, 3 Wright 888, it was held that *Young vs. Grote*, if it could be supported at all, was not applicable to bills of exchange or promissory notes, and therefore that where a note was indorsed for the accommodation of the maker, who fraudulently filled up a blank space before the real sum, so as to increase the amount, the indorser was not liable even to a *bona fide* holder for more than the original sum. And this is also the effect of the decision in *Ives vs. Farmers' Bank*, 2 Allen 241.

The other question raised in the foregoing case, as to whether one who takes a bill or note as collateral security for an antecedent debt is a holder for value, which has been much discussed in the United States, and on which the authorities are greatly at variance, is considered at length in the note to *Le Breton vs. Pierce*, in this volume, p. 35, and in that to *Swift vs. Tyson*, 16 Pet. 1, in 1 Am. Leading Cases 333. See also *Atkinson vs. Brooks*, 26 Verm. 378;

Bank of Republic vs. Carrington, 5 R. L. 519; *Roxborough vs. Messick*, 6 Ohio, N. S. 448, in which the subject is discussed with great learning and ability. In addition to the cases referred to in our previous note, and in the foregoing opinion, in support of the dictum of Judge STORY in *Swift vs. Tyson*, may be cited the more recent decisions of *Bridgeport Bank vs. Welch*, 29 Conn. 476; *Auston vs. Curtis*, 81 Verm. 64, *semb.*; and against it, *Prentiss vs. Graves*, 33 Barb. 622; *Farrington vs. Frankfort Bank*, 31 Id. 188; *Lea vs. Smead*, 1 Metc. Ky. 628; *Alexander vs. Springfield Bank*, 2 Id. 534. In *Davis vs. Miller*, 14 Gratt. 1, the question was left undecided.

While the courts of Pennsylvania and New York hold, beyond doubt, that one who takes a note merely as collateral

security for an antecedent debt is not a holder for value, and is therefore not protected when the note has got into circulation by fraud or in violation of some agreement (*Kirkpatrick vs. Muirhead*, 16 Penn. St. 381; *Prentiss vs. Graves*, 33 Barb. 622), yet they have also held latterly that an accommodation maker or indorser cannot depend, in a suit on the note, on the ground of want of consideration alone. *Appleton vs. Donaldson*, 8 Penn. St. 381; *Lord vs. Ocean Bank*, 20 Id. 386; *Moore vs. Baird*, 30 Id. 138; *Work vs. Kase*, 34 Id. 140; *Zeng vs. Fyfe*, 1 Bosworth 335; *Robbins vs. Richardson*, 2 Id. 248. The reason assigned for this distinction is that accommodation paper is a mere loan of credit, without restriction as to the manner of its use. H. W.

New Jersey Supreme Court, June Term 1862.

THE STATE vs. BABCOCK & BABCOCK.

By the compact between the States of New Jersey and New York, approved by Congress in the year 1834, the State of New York has exclusive jurisdiction over all the waters of the Hudson River, and of and over the lands covered by the said waters, to the low-water mark on the New Jersey shore. On an indictment in New Jersey for obstructing the free navigation of the said river, by placing, sinking, and lodging in the said river certain ships, schooners, boats, and other vessels, the jury rendered a general verdict of guilty, but found as a fact that the defendants had, within the times specified in the indictment, placed and procured to be placed vessels and wrecks of vessels both above and below the low-water line, which were an interruption to the navigation. A new trial was granted.

Observations on the nature and ground of the compact between the States.

This case came before the court upon a special state of the case made on the trial, accompanying a general verdict of guilty. The indictment was originally found in the Court of Oyer and Terminer of the county of Hudson, which, being removed into the Supreme Court by *certiorari*, was taken down for trial at the Hudson Circuit. The opinion of the Court was delivered by

- **ELMER, J.**—By the compact between the States of New Jersey and New York, ratified by the legislatures of the two States, and approved by Congress, in the year 1834, the State of New York has exclusive jurisdiction of and over all the waters of Hudson river, and of and over the lands covered by the said waters, to the low-water mark on the New Jersey shore; and the State of New Jersey has the exclusive right of property in and to the land under the water lying west of the middle of the river, and exclusive jurisdiction of and over the wharves, docks, and improvements made or to be made on the Jersey shore, and on vessels aground on said shore, or fastened to any such wharf or dock, except as to quarantine regulations and the exclusive right of regulating the fisheries on the westerly side of the middle of the river. The waters of the Hudson, although exclusively within the jurisdiction of New York, are a common highway for all the citizens of the United States. Any obstruction to that highway, placed on the shore above the low-water mark, which shore remains exclusively within the jurisdiction of New Jersey, either by means of vessels, logs, stones, or other temporary obstructions placed there, or by means of a wharf or other improvements, which are injurious to the navigation, is of course indictable in this state; while obstructions below the low-water mark, where not only the water, but the land under the water, are exclusively, except as to the fisheries, within the jurisdiction of New York, can only be punished by proceedings in the courts of that state, or of the United States. If by docks as used in the compact, is meant, as I suppose, according to the American usage, the spaces between wharves, the land covered by the water within such docks is also within the jurisdiction of this state, and obstructions placed therein which are injurious to the navigation, may be indicted in our courts.

The indictment in the case before us, charges that the defendants obstructed the free navigation of the river, by placing, sinking, and lodging in said river, and upon the shore of this state, in said river, certain ships, schooners, boats, and other vessels; and it is found as a fact by the jury, according to the special case returned to us with a general verdict of guilty, that the defendants

had within the times specified in the indictment, placed and procured to be placed, vessels and wrecks of vessels both above and below the low-water line, which were an interruption to the free navigation of the river. Other facts are also found by the jury, which perhaps were meant to show that obstructions were placed in a dock; but the indictment does not charge that any obstructions were placed in a dock, nor do the facts stated enable us judicially to determine that such was the case. What is a dock, I suppose, is a mixed question of fact and law.

Had the special case explicitly stated that the obstructions placed on the shore, that is on the land covered by the tide between the high and low water lines, were obstructions to the navigation of the river, and did it sufficiently appear that the two defendants had acted jointly in placing and keeping them there, I should be of opinion that judgment ought to be pronounced for the State. As the case appears, it will be the only safe course to send down the case for a new trial, that these two questions may be distinctly submitted to the jury.

It has been earnestly insisted that the safety of property holders on the Jersey shore requires us to hold that obstructions in the river, outside of the low-water line, if injurious to the navigation of vessels coming to that shore, are offences against our laws, and indictable in our courts. But apprehensions of this kind, which are probably altogether imaginary, will not justify us in departing from the plain meaning of the compact. Although for some purposes New Jersey is bounded by the middle of the Hudson, and the state owns the land under the water to that extent, exclusive jurisdiction not only over the water, but over the land to the low water line on the Jersey shore, is, in plain and unmistakeable language, granted to, or rather acknowledged to belong to, the state of New York. There is no reason to doubt that the tribunals of that state, which have a common interest in preventing all obstructions to the navigation of the waters surrounding their most important city, will not only punish all crimes against our citizens or their own, while in or upon those waters, but will also adequately punish all interference with the navigation. The case does not materially differ from a line between two states, on the

land which happens to be the scene of a busy population, where a manufactory near to that line in one state, may be a nuisance to the citizens of the other, whose redress will have to be obtained from the tribunals of the state in which the nuisance is situate.

As persons not acquainted with the circumstances of the dispute between the States of New Jersey and New York, in regard to the respective rights in the river and bay separating them, have sometimes complained of the compact agreed upon after a long and troublesome controversy, and after the failure of two previous attempts to terminate it by agreement, as having conceded too much to New York, it may be proper to take this opportunity of explaining the obvious motives which induced the commissioners and the legislature of this State to consent to the terms finally adopted.

The territories now forming the States of New York and New Jersey, including by name Hudson's river, were granted originally by King Charles the Second to his brother, the Duke of New York, afterwards James the Second. The Duke granted to Lord Berkley and Sir George Carteret, the territory now the State of New Jersey, and described it as "all that tract of land adjacent to New England, and being to the westward of Long Island and Manhitas Island, and bounded on the east part by the main sea and part by Hudson river, and hath upon the west Delaware bay or river." Between the date of this grant and the Revolution, the charters of New York city, and the proceedings of its authorities, showed that it had always been claimed that the whole of Hudson's river, up to the low-water mark on the westerly shore, belonged to that State. After the Declaration of Independence, it was claimed by New Jersey that the conquest from the crown extended that State to the middle of the river. These conflicting claims led to the appointment of commissioners by the two States to settle the conflicting claims in 1807, and again in 1827, without success.

In the meantime Judge WASHINGTON had decided that the grant to New Jersey limited its territory to the eastern shore of the Delaware river and bay, a decision acknowledged by this Court to be correct. *State vs. Davis*, 1 Dutch 386. And what was still more adverse to the claim of this State, in reference to the waters of the Hudson, the Supreme Court of the United States laid down the

doctrine that "when a great river is the boundary between two nations or States, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one State is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly-created State extends to the river only." And upon this principle they held that the Ohio river was exclusively within the territorial limits of Kentucky, and that Indiana had no jurisdiction over or rights to the river. *Handly's Lessee vs. Anthony*, 5 Wheat. 360.

When the Commissioners of New Jersey and New York again met, in 1833, and it was found that those of the latter State appeared to be desirous of arranging the dispute upon fair and liberal terms, but deemed it indispensable that their great commercial emporium should have the exclusive control of the police on the surrounding waters, and full power to establish such quarantine regulations as should be found necessary, the commissioners of this state deemed it wise to secure the exclusive property in the soil to the middle of the river, and exclusive jurisdiction over the wharves, docks, and other improvements, made or to be made, on the Jersey shore, and over the vessels fastened thereto, and the right to regulate the adjacent fisheries, leaving to New York what was thought to be quite as much a burthen as a privilege, the exclusive jurisdiction over offences in or upon the water, or the land covered by the water, outside of the low-water mark. As it was thought possible that the time might come when Perth Amboy will be an important city, like exclusive jurisdiction over the adjacent waters, to the low-water mark on Staten Island, was secured to this State. Nothing has since occurred to make the propriety of this arrangement doubtful; on the contrary, there is every reason to believe that it has secured important rights to this State which otherwise might have been lost.

In further elucidation of this subject, it is to be noticed that the river Delaware was never within the jurisdiction either of this State or Pennsylvania, until, by the Revolution, the right of the Crown was extinguished, and each State then held to the middle. Under these circumstances the agreement between the two States,

adopted in 1788, provided that the two States should have concurrent jurisdiction in and upon the water of that river. Of so little importance, however, was this regulation that it was not until so lately as 1856 that a law of this State was passed for the punishment of offences committed on that river.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF PENNSYLVANIA.¹

Assignment for benefit of Creditors.—An agreement of lease by which the Philadelphia and Sunbury Railroad Company placed its entire road in the possession of the Sunbury and Erie Railroad Company, to be stocked, repaired, and run at certain rates of tolls, and after applying the proceeds to these objects, so far as necessary, then to pay the earnings remaining to certain preferred creditors of the Philadelphia and Sunbury Railroad Company, lessors, is an assignment for the benefit of creditors, within the meaning of the Act 24th March, 1818, and, having been recorded within thirty days from its date, in the county wherein the road of the lessors was situated, is good as an assignment, though not intended as such by the parties: *Bittenbender vs. Sunbury and Erie Railroad Company*.

The preferences in the assignment are void because forbidden by law; but for all other purposes, the assignment is good, and is not avoided, if the railroad company's lessee had no power under their charter to act as trustee; for, if so, the courts would supply a trustee who was competent: *Id.*

An assignment, like a grant, may be made of any property of which the assignor has the actual or potential possession; and the road of the Philadelphia and Sunbury Railroad Company being property in possession, and its future earnings potential, capable of being inventoried and appraised under the Act of Assembly relating to assignments, both interests passed to and vested in the Sunbury and Erie Railroad Company for the purposes of the agreement, the legal effect of which was an assignment in the trust for creditors: *Id.*

The operative words of the instrument were not an assignment directly

¹ From Robert E. Wright, Esq., State Reporter, to be reported in the 4th volume of his Reports.

to the preferred creditors, but to the Sunbury and Erie Railroad Company, for them; the possession of the road was granted as property to the latter company as trustee under an express trust for the benefit of creditors: the lease, therefore, possessing all the elements of an assignment, must be construed as such: *Id.*

Where one of the preferred creditors, whose bill was against the Philadelphia and Sunbury Railroad Company for repairs of the rolling stock, continued work for the Sunbury and Erie Railroad Company after they had taken possession, upon the promise of the president to pay him as prescribed in the agreement of lease, and, upon failure of payment, brought his action of *assumpsit* against the latter company, proving the agreement, and that the lessors had received net profits sufficient to meet his claim, it was

Held, that the agreement of lease being but an assignment for the benefit of creditors, and the preference therein in the plaintiff's favor being void, though the work had been done for repairs of the rolling stock, the promise of the assignee to pay according to the preferences therein expressed, was but a promise to execute the assignment, and not such as could be enforced against the Sunbury and Erie Railroad Company, whose president was the promissor: *Id.*

Bailment—Pledge—Warranty of Title.—A pledgor, by the act of pledging, impliedly engages that he is the owner of the property pledged; and where the ownership of any part of it is not in him, he is liable to the pledgee in damages, if by reason of defective title it is taken from him: *Mairs vs. Taylor.*

B., the owner of a lot of sheep in Ohio, executed a chattel mortgage to T. to secure purchase-money, and afterwards sold to M. 350 of them at \$3 per head, T. agreeing to release the lien of his mortgage upon those bought by M., who agreed to pay him a certain sum "upon the arrival of the sheep at Pittsburgh, and to allow T. to hold possession of the sheep until said sum was paid." While on the road, in T.'s possession, 200 of them were replevied by another party on a claim of lien on them as against B., and the remainder taken to the place mentioned, where M. demanded the whole number, tendering the sum agreed on, which T. was willing to receive, and to deliver the 150 sheep still in his possession. M. refused this offer, and brought replevin. On case stated, in the replevin suit, the Court entered judgment for the defendant for the value of the sheep at the price agreed to be paid.

Held, that the entry of the judgment was not error : *Id.*

Chattel Mortgage—Decedent.—Where, under a mortgage of chattel, the mortgagee having the right to take possession and sell on default in payment, did, upon such default, after death of mortgagor, take possession of and sell the chattels mortgaged, it was *Held*, That an action of trover would lie against him, by the administrator of the decedent, to recover the value of the goods sold : *Kater vs. Steinruck's Administrator.*

On the death of a mortgagor, his personal estate in possession passes into the custody of the law, to be administered for the benefit of all parties, and the mortgagee has no right to take it in satisfaction of his own debt, whether sufficient property has been left by the decedent to pay the debts or not : *Id.*

The mortgagee in such case cannot, in the action of trover, set off the debt due him by the mortgagor against the value of the property converted ; because, to allow the set-off, would be to sanction the seizure of the property, and would mix the remedies of tort and debt in the same action : *Id.*

Constitutional Law—Stay Law.—The proviso of the first section of the Act 21st May 1861, granting stay of execution, under certain conditions, on "all judgments or debts upon which stay of execution has been or may be waived by the debtor in any original obligation or contract upon which such judgment has been or may hereafter be obtained," is unconstitutional, being in conflict with Section 10, Art. I., of the Constitution of the United States, and with Section 17, Article IX., of the Constitution of Pennsylvania : *Billmeyer vs. Evans & Rodenbaugh.*

Where the defendants, on the 12th July 1860, signed a sealed bill authorizing the entry of judgment against them for \$1000, payable twelve months after date, "*without stay of execution after the day of payment.*" the release of their statutory right to a further stay became a part of the contract, and, as such, could not be impaired or altered by the legislature ; therefore, where the Court of Common Pleas, after the day of payment, granted an additional stay of execution under the Act 21st May 1861, it was error : *Id.*

If the parties to a contract include in it the legal remedy by which it is to be enforced, a legislative enactment changing the remedial process agreed on in regard to that contract, is as clearly unconstitutional as the attempt to impair the obligation of any other contract : *Id.*

Criminal Law—Peremptory Challenges—Trial by Jury—Constitutional Law.—The allowance of four peremptory challenges, under the "Criminal Procedure Act" of 1860, does not conflict with the constitutional provision "that trials by jury shall be as heretofore, and the right thereof remain inviolate :—" *Hartzell vs. Commonwealth.*

Where the peremptory challenges on the part of the Commonwealth exhaust the jury selected from the regular "*Venire*," and *talesmen* are called from the bystanders, the prisoner is not thereby deprived of a trial by jury, "as heretofore," under the constitution; for if the Commonwealth have the right to challenge, the legal consequences which flow from its exercise cannot affect the right itself, and the right existing, its incidents are legal, one of which is the calling and impannelling talesmen: *Id.*

The Commonwealth is not compelled to exercise her right of challenge, in the order of calling the jury, so that if the challenges to the first four called are waived she cannot afterwards challenge, but is entitled to four peremptory challenges out of *all* the jurors that may be called at any time before the panel is full, and passing by individual jurors, and permitting them to be challenged by the prisoner or sworn, is no waiver of the right: *Id.*

Deed—Subscribing Witness—Opinion as to Capacity.—Though subscribing witnesses to a *will* may be asked their opinion of the testator's capacity to make a will, at the time of their attesting it, yet in case of a *deed* they must testify to facts only on the point of the sanity or capacity of the grantor; they cannot give their opinion as to his competency to contract, for the *execution* of the deed is all that is attested by them: *Dean vs. Fuller.*

Therefore it was not error in the Court below to overrule questions propounded to the subscribing witness in a deed, "whether in his opinion the plaintiff had an unusual or undue influence upon" the grantor "at the time of the execution of the deed," and "whether in your opinion was the grantor in a fit condition to make the deed to 'the grantee' or to deal with him at all at the time;" for the facts to show undue influence were for the jury, who alone were to draw the conclusion whether or not it existed, while the questions offered, if admitted, would have proved the conclusion without the facts: *Id.*

Where the evidence offered to set aside a deed was not such as would justify a chancellor in decreeing its cancellation, or a common law court in declaring it inoperative, no fraud, legal incapacity, or mistake being shown, it was not error to direct the jury to find a verdict for the plaintiff,

who, in an action of ejectment brought by him to recover the land conveyed therein, claimed under the alleged fraudulent deed. Insufficient evidence need not be submitted to a jury: *Id.*

COURT OF CHANCERY OF THE STATE OF NEW JERSEY.¹

Will.—Heirs, when construed next of Kin.—Testatrix was possessed of personal and real estate, and by her will directed the latter should be sold by her executors, and after giving numerous pecuniary legacies, principally among her relatives and the relatives of her deceased husband, she added, “and if there is anything over and above left, let it be equally divided among all the heirs.”

Held, that the word heirs, in the above connection, means “next of kin.” *Jane Scudder’s Executors vs. Isaac Vanarsdale and others.*

Where money or personal property is bequeathed to the heirs of A. or to the heirs of the testator, if there be nothing in the will showing that the testator used the word in a different sense, the next of kin are entitled to claim under the description as the persons appointed by law to succeed to personal property: *Id.*

Infant.—Right of Father to Custody.—Constitutional Law.—At common law the father, in the first instance, is entitled to the custody of his children, but courts will exercise a sound discretion for the benefit of the children in disposing of their custody: *Bennet vs. Bennet.*

The act of the 20th of March 1860, has materially altered the rule of the common law, and has, to a certain extent, deprived the court of this exercise of its discretion in disposing of the custody of children. By this act the custody of the children within the age of seven years is transferred from the father to the mother: *Id.*

This act is not unconstitutional, nor is it void as being incompatible with the fundamental principles of government: *Id.*

Deed.—Cancellation does not divest Estate.—Purchaser with Notice.—The question is well settled at common law that the cancellation of a deed by consent of parties will not divest the grantee, and revest in the grantor an estate which has once vested: *Harris Wilson vs. Josiah Hill and Catharine his wife and Frances Watts*

¹ From Mercer Beasley, Esq., Reporter of the Court, to be reported in the 2d volume of his Reports.

The title to lands vested in a married woman by an unrecorded deed cannot be divested by her parol consent that such deed may be cancelled, and a conveyance made by her grantor to her husband : *Id.*

A *feme covert* was seised of certain lands. She being ill, consented, at the solicitation of her husband, to the cancellation of her deed and to a conveyance from her grantor to her husband. During her lifetime her husband married a second wife. Being imprisoned on charge of bigamy, he and his mistress reconveyed the lands to his wife, she and her husband executing a mortgage for the benefit of the husband to a third party; this mortgage was afterwards assigned to complainant, who was a lawyer, the counsel of the husband, and had knowledge that the property had been held by the husband in trust, and that the mortgage was also held in trust for the husband—it was held that the complainant had sufficient knowledge to put him on inquiry; that he was not a *bonâ fide* holder, and that the mortgage was void in his hands : *Id.*

Married Woman—Power to Contract.—Liabilities voluntarily incurred by a married woman will be charged upon her separate estate, but she cannot by her contract make herself personally liable : *Pentz vs. Simonson and Wife.*

The act of 1857, which provides that a *feme covert* may covenant as to the title of her lands, affords the strongest legislative construction that the act of 1852 does not by necessary implication confer upon her the right to dispose of her real estate, or to make contracts in regard to it : *Id.*

A contract entered into by a married woman for the sale of her estate cannot be enforced : *Id.*

But equity will charge her separate property with the repayment of money advanced to the wife, at her instance and for her benefit, or on account of her estate : *Id.*

Subrogation—Married Woman—Separate Estate.—To entitle a party who pays the debt of another to the rights of the creditor by subrogation, the debt must be paid at the instance of the debtor, or the person paying it must be liable as surety or otherwise for its payment : *Garret Wilson vs. William Brown and Mary Ann Brown, his Wife.*

Where the title to land is in a married woman as her separate property, she and her husband living separate, and money is paid and advanced at her instance and for her benefit, a mortgage executed by her alone to secure such advances will be a valid and equitable lien on such property : *Id.*

Interest—Mortgage.—A decree will bear only six per cent. interest, although founded on a mortgage drawing seven per cent.: *Wilson vs Marsh*.

Decrees in equity, as well as judgments at law, universally bear the legal rate of interest, without regard to the terms of the contract or to the place where it was executed, whether within the state or abroad: *Id*.

SUPREME COURT OF MASSACHUSETTS.¹

Shipping—General Average—Bill for Contribution.—The owners of a vessel may maintain a bill in equity to recover contribution from the owners of the cargo, if the master, in order to avoid the danger of being driven, broadside on, upon a reef, sacrifices the chance of saving her from this peril, and runs her over the reef and upon the beach, and thus saves a portion of the cargo which would have been lost, if she had gone to pieces upon the reef: *Merikew vs. Sampson*.

A claim for contribution may be maintained against the owners of a cargo, although the vessel is totally lost: *Id*.

Criminal Law—Passing Counterfeit Money—Pleading.—It is no variance to allege that a counterfeit bank bill was uttered and passed as true to a person to whom it was actually delivered by the defendant as a true bill, although that person was only the servant of another and had no interest in the transaction: *Commonwealth vs. Starr*.

If a counterfeit bank bill is uttered and passed as true to a person who in taking it acts only as the servant of another, and has no interest in the transaction, the jury may nevertheless find as a fact an intent to defraud that person, if the defendant did not know him to be a servant, and dealt with him as a principal; although the evidence would also support an allegation of an intent to defraud the unknown master: *Id*.

Criminal—Larceny of Gas.—Illuminating gas may be the subject of larceny: *Commonwealth vs. Shaw*.

Larceny of illuminating gas may be committed by a person on his own land, by secretly opening a gas company's service-pipe which was laid there for the purpose of supplying his house with gas, and connecting the same with another pipe, through which he secretly and fraudulently re-

¹ From Charles Allen, Esq., State Reporter; to be published in the forthcoming volume of his Reports.

ceives and uses the company's gas, after they have closed their service-pipe and removed their meter, and given him notice thereof. *Id*

Criminal Law—Murder—Aiding to commit Suicide.—Aiding another to commit suicide is murder: *Commonwealth vs. Pratt.*

Promissory Note—Invalidity of Indorsement.—In an action by the indorsee against the maker of a promissory note, the defendant cannot show in defence that the plaintiff procured the indorsement by undue influence from the payee, when he was of unsound mind and incapable of making a valid indorsement, if the payee or his legal representatives have never disaffirmed it; or that the payee, for a valuable consideration, had agreed to give up the note at his death to the maker, reserving meanwhile the right to collect the interest thereon: *Carrier vs. Sears.*

Decedent—Order of Sale for Payment of Debts.—An administrator cannot maintain a petition for leave to sell real estate for the payment of debts of his intestate, if there are no debts due from the estate which can be enforced at law: *Lamson vs. Schutt.*

Guardian and Ward—Liability for Support.—In the absence of an express contract, no action can be sustained against a guardian to charge him personally with the support and education of his ward. And if he has permitted his ward to remain in the care and custody of another, without any express contract for any definite period of time, he may terminate his personal liability to pay for their support and education by giving notice to that effect, although at the time of giving notice the ward is sick and unable to be removed: *Spring vs. Woodworth.*

Guardian and Ward—Effect of Foreign Appointment.—One who has been appointed under the laws of another state to be the guardian of a child whose legal domicil is in that state, has no absolute right to the custody of the person of his ward in this Commonwealth; but his official position will be considered by the Court as an important element in determining to whom the custody of the child shall be granted: *Woodworth vs. Spring.*

The appointment in this Commonwealth of a guardian over a child whose legal domicil is in another State, and who has a guardian appointed under the laws of that State, does not deprive this Court of the power, in its discretion, to decree the custody of the child to the foreign guardian: *Id*

Criminal Law—Evidence of Wife.—In the trial of a complaint against a man for an assault and battery upon his wife, she is a competent witness in his favor: *Commonwealth vs. Murphy.*

Lost Note—Action by Holder.—The owner of a lost note cannot maintain an action at law against the indorser, in a case where a bond to indemnify the defendant against being called on a second time to pay the note would not afford to him an adequate protection: *Tuttle vs. Standish.*

Town—Liability for Defective Highway.—A town is not responsible in damages if a horse, being frightened by an accident, breaks away from his driver and escapes from all control, and afterwards, while running at large, meets with an injury through a defect in a highway: *Davis vs. Dudley.*

Will—Construction—Perpetuity.—Under a will which, after various specific devises and bequests, contains the following provision: "If anything remains, my will is that the residue shall be deposited in the Worcester Savings Bank, and to be appropriated by my executors to the relief of my heirs, if they at any time shall need pecuniary assistance;" the entire beneficial interest in the residue vests in those who are the heirs at law of the testator at the time of his death, and, if they all desire it, and the executors consent, the trust may be annulled, and the property distributed amongst them, upon their executing a release to the executors: *Smith vs. Harrington.*

Note payable in Instalments—Indorsement when overdue—Mortgage.—A note payable by instalments is overdue when the first instalment is overdue and unpaid; and one who takes it afterwards takes it subject to all equities between the original parties: *Vinton vs. King.*

The same defences may be made in an action on a mortgage, the Statute of Limitations excepted, which might be made in an action on the debt which the mortgage was given to secure: *Id.*

SUPREME COURT OF NEW YORK.¹

Actions by Public Officers—Facts assumed to be true on the Trial.—Actions by public officers, as such, should be brought in their individual names, with the title of their office added: *Paige vs. Fazzerckerly.*

¹ From the Hon. O. L. Barbour, Reporter of the Court.

If, in an action brought by one as "chamberlain, &c.," no objection is taken, on the trial, that the plaintiff is not chamberlain, it will be *assumed*, on appeal, that the fact of his being the incumbent of the office was understood, or taken for granted: *Id.*

When it is obvious that a fact was assumed on the trial, it is as much in the case as if it were expressly proved: *Id.*

When a court of review is satisfied, from the general scope and tenor of the proceedings on the trial, that a particular fact was not a matter of contest, nor a ground of objection there, but was assumed or taken for granted in the conduct of the cause, it may and should conclude that the fact was as it was assumed to be: *Id.*

Fire Insurance—Material Stipulations.—Evidence of Assent to other Insurances.—A stipulation, in a policy of insurance, that the insurance shall be void, in case the assured, or any other person with his knowledge, shall have or make any other insurance on the property, not notified to the insurers, and mentioned in, or indorsed upon, the policy, is a material part of the contract between the parties: *Gilbert vs. The Phoenix Insurance Company.*

The parties to a contract of insurance have the right to stipulate, between themselves, as to the nature and kind of evidence by which the assent of the insurers to other insurances shall be manifested. And when they have thus stipulated, the court has no power to substitute any other kind of evidence, differing in kind or degree: *Id.*

Variance—False Representations.—When it appears that the defendant was not, and could not have been, misled by a variance between the complaint and the proof, the variance may be disregarded, without amendment: *Craig vs. Ward et al.*

A party making a representation false in fact renders himself liable in an action for fraud, although he did not actually know the representation to be false at the time: *Id.*

If a party makes a material representation, without knowing whether it is true or false, and it turns out to be false, an action lies for the fraudulent misrepresentation: *Id.*

Sheriff—Indemnity to Bidders.—A sheriff acts *officially*, in selling the property of a stranger to the execution as the property of the defendant therein. He may take an indemnity from the plaintiff, for such an act,

when done in good faith, but cannot give an indemnity to the bidders at the sale: *Bell vs. Pratt*.

Where an under-sheriff agreed with the bidders at a sheriff's sale to warrant the title to the property sold, *held*, that the agreement rested upon no consideration of benefit to the sheriff, except as it necessarily tended to increase the fees and perquisites of his office; and that in that respect it was void, as against public policy: *Id*.

A sheriff, while in the discharge of his official duty, cannot divest himself of his official character, and do as an individual what he cannot do as a public officer: *Id*.

Divorce Suit—Dower.—The late Court of Chancery had no authority, in a divorce suit, to require a married woman to accept a gross sum from her husband in lieu of, and in satisfaction of, her dower. And her acceptance of such a sum, in the lifetime of her husband, will not defeat her dower: *Crain vs. Cavana*.

Her release of dower, to her husband, pursuant to an order of the court, although acknowledged in due form, would be a nullity: *Id*.

Hops Personal Property.—Hops growing and maturing on the vines, which are produced by the annual cultivation of the owner, are personal chattels within the meaning of the Statute of Frauds; and as such are subject to sale like other personal property: *Frank vs. Harrington*.

Railroad Companies—Liability as Carriers of Passengers.—It is not unlawful, nor against public policy, for a railroad company to convey passengers by stage to and from one of its stations and an adjacent village, in connection with and as a part of its business of transporting passengers upon its road; nor is a contract made by it thus to carry a passenger, *ultra vires*: *Buffit vs. Troy and Boston Railroad Company*.

Such a contract is lawful, and the corporation is estopped from denying its validity: *Id*.

Where a railroad company employs an individual to convey passengers to and fro between a village and a station on the railroad, in stage-sleighs furnished, together with the horses and drivers, by him, such company is liable in damages for any injury sustained by a passenger in consequence of the overturning of a stage-sleigh through the negligence of the owner or his servant: *Id*.

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ARREST.

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1. A warrant was issued by a justice of the county of C., directed to the constable of the township of N., and generally to all her Majesty's officers of the peace in and for the said county, commanding them, or some of them, forthwith to apprehend W. G., and convey him before two justices of C. to answer for not obeying a bastardy order for payment of money. The warrant was delivered to the superintendent of police, and had subsequently been in the possession of D., one of the police constables. Afterwards D. and S., police constables, while on duty in uniform, arrested W. G. under the warrant, but they had it not in their possession at the time of the arrest, it being at the station house. W. G. was rescued by several persons, who assaulted the constables D. and S. Whereupon informations for the rescue and assault were laid against the parties by the constables; and at the hearing before justices the complaint as to the rescue was withdrawn, and that for the assault proceeded with, and the parties were convicted:

Held, that the conviction was bad, as the arrest by the constables was illegal, they not having the warrant in their possession at the time. *Galliard vs. Laxton*, . 305

Held, also, that the withdrawal of the information as to the rescue was no bar to proceeding with the complaint as to the assault. *Id.*

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1. A collusive settlement of an action, by the parties, to deprive an attorney of his costs, made after a notice from the attorney, of his claim, to the defendant, will not be allowed to prejudice the attorney's right to enforce payment of his taxable costs. *Carpenter vs. The Sixth Avenue Railroad Company*, . 410

2. His claim for taxable costs will be protected against a collusive settlement in an action upon a *tort* merely *personal*, as well as in an action upon contract; and as well against a settlement made before trial as after judgment. *Id.*

3. But an attorney, by an agreement between him and his client, that, besides taxable costs, he shall receive as a compensation for his services a sum equal to one-third of the sum recovered, will not acquire any right in the *subject-matter* of such an action, or control over it, which will affect the power of the plaintiff to settle and release the *claim for damages* before a trial has been had. *Id.*

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BILLS AND NOTES.

I. *Remitted for collection, and credited as cash, when held for value.*

M., C. & M., of Baltimore, indorsed in blank and deposited for collection with J. L. & Co., bankers and collecting agents in the same city, a bill payable in New York. The latter indorsed for collection to the plaintiffs, also bankers and collection agents doing business in New York. Each of these two houses was constantly remitting paper to the other

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for collection, and knew that each remitted paper for collection belonging to third persons. The remitted paper, when payable at sight, was collected, and then credited as cash. That payable in *futuro* was entered in the books of the house receiving it, as received for collection, and was not otherwise credited, unless, nor until it was actually paid. According to the course of business, each house drew for the cash balance in its favor, arising from actual collections, and not against paper remitted and not matured. There was no express agreement between them, that either should hold the paper it held running to maturity, as security for the paper remitted to the other for collection, or for cash balances. J. L. & Co., at the time of remitting the bill in question to the plaintiffs, owed them a small cash balance, and immediately thereafter received from the plaintiffs other remittances, which they collected, but failed to pay over, and failed in business before the bill in question matured. The plaintiffs were immediately notified that the bill belonged to M., C. & M., but on demand thereof refused to surrender it.

Held, That the plaintiffs could not retain the bill as against M., C. & M., as indemnity against the balance owing to them by J. L. & Co., and that they were not *bonâ fide* holders for value in such sense as to have acquired a title superior to that of M., C. & M. *Hoffman vs. Miller*, 676

2. *Held*, also, That evidence by the plaintiffs, that in making the remittances, made after receiving the bill in question, they looked to, and relied on, the unmatured paper in their hands, received from J. L. & Co., was not entitled to any consideration, as neither any agreement nor the course of dealing between them and J. L. & Co., authorized them to so rely, and J. L. & Co. had no reason to suspect that any remittance made to them was influenced by any such consideration. *Id.*

II. Fraudulently negotiated—*Bonâ fide* Holder—Antecedent Debt, when good Consideration.

Where L. executed and delivered to H. four blank promissory notes, and authorized him to fill the blanks with sums not exceeding \$5000 each, for the purpose of negotiating them for the benefit of L.; and H. delivered to L. similar notes, to serve as receipts, or to indemnify him in case he (H.) should misuse any of the funds arising from the negotiation of L.'s notes; and H. returned the notes executed by L. to him with the blanks unfilled; and one of the notes executed by H. was filled by L. with the sum of \$8629.81, and passed to the plaintiffs by indorsement as collateral security for an antecedent debt, it was *held*, that the court did not err in instructing the jury:

1. That the *onus* of showing the consideration of the note was upon the maker, the presumption being that it was sufficient.

2. That if the indorsees were *bonâ fide* holders for a good consideration, it could make no difference that it was executed in blank, or that it was accommodation paper which had been misused by the indorser.

3. That if the transaction was an exchange of notes, the indorsee could not be defeated by showing that, subsequent to the transfer, H. had delivered up and cancelled the notes of the indorser.

4. That if H.'s notes were delivered merely to stand as receipts to protect L. in case H. should misuse the funds arising from the notes given to him to negotiate, any note filled up by L. (his notes having been returned to him) would in his hands be without consideration.

5. That the presumption was that the indorsee took the note in good faith, in the usual course of business, before its maturity, and for a valuable consideration; that express or actual notice that the note was without consideration, or that it had been filled up without authority, was not necessary; that it is sufficient if the circumstances brought home to the plaintiffs are of such a strong and pointed character as necessarily to cast a shade upon the transaction and put them upon inquiry; that the indorsees are not charged with notice because of any want of diligence on their part in making inquiry, or if they took the note under

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suspicious circumstances, provided they had no notice actual or constructive of the equities between the original parties; that the defendant was not bound to prove that the plaintiff purchased with full and certain knowledge of the want of consideration, but if the circumstances attending the transfer of the note were such as to put them on their guard, or if they must have known therefrom that the person offering it had no right to transfer it, then they were bound to make inquiry, and if they did not, they took the note at their peril.

6. That though the plaintiffs took the note as collateral security for an antecedent debt, they are nevertheless *prima facie*, though not conclusively, to be considered as holders for value, and it is on the defendant to show that they are not such holders; that if it was taken for collateral security only, the plaintiffs parting with nothing, giving no time, relinquishing no right, nor suffering damages or injury as the consideration or in consequence of receiving it, they would not be such holders. *Trustees of Iowa College vs. Hill*, 749

III. *Where Demand to be made, on change of Residence of Maker.*

1. A. made his promissory note in the city of New York, payable generally. He resided at the time in New York, as well as the indorser. Before the note fell due, he removed to New Jersey, where he resided at its maturity. *Held*, that it was not necessary for the holder, in order to charge the indorser, to present the note for payment at the maker's former place of residence in New York. *Foster vs. Julien*, 365

2. The cases of *Anderson vs. Drake*, 14 Johnson 114, and *Taylor vs. Snyder*, 8 Denio 145, commented upon, and the case of *Wheeler vs. Field*, 6 Metcalf, 290 overruled. *Id.*

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2. If the testator, after executing the will, changes his domicile and resides under another jurisdiction at his death, the formalities required by the new domicile must have been observed, or the will is void. *Id.*

3. A will is an inchoate and provisional transaction until the testator's death, and the law may require, after its execution, new formalities to be complied with. These, as well as other formalities, must have been observed by all testators domiciled in the jurisdiction at the time of their death, without reference to their domicile when the will was executed. *Id.*

4. In order that the principles of "comity" may be invoked in favor of the wills of testators domiciled elsewhere, they must have resided in another State at the time of their death. The will is then enforced in accordance with the rules of international law applicable to the subject. *Id.*

5. An act done in another State, in order to create rights which our Courts ought to enforce on the ground of comity, must be of such a character, that if done in this State in conformity with its laws, it could not be constitutionally impaired by subsequent legislation. *Per DENIO, J. Id.*

6. H., the alleged testator, made his will of personal estate in South Carolina, where he then resided. He did not, when it was executed, declare to the subscribing witnesses that it was his last will and testament. This declaration was not necessary by the law of that State, and it was conceded that the will was at the time properly executed for South Carolina purposes. After making his will he removed to New York, where he resided at the time of his death. In this State such a declaration is necessary. He died without republishing his will. *Held*, that the will was void, and that H. died intestate. *Id.*

7. The law of the continent of Europe is not to be resorted to in determining a question of this kind, until the sources of instruction, furnished by the Courts and jurists of England and of this country, have been exhausted. *Id.*

III. *Domicil, how far it governs Succession.*

1. The inheritance, whether testamentary or from intestacy of a foreigner, and especially of an American of the United States, not domiciled in France, must be regulated as to personal property existing in France, without excepting the loans of the State by the law of the country where the foreigner's domicile was, and where, consequently, his inheritance was unobstructed. *Succession of Gouriz*, 424

2. This rule, founded upon the maxim *mobilia sequuntur personam*, has no exception, except where Frenchmen interested as heirs in the inheritance of a foreigner, have to defend themselves as to property existing in France against dispositions or statutes contrary to some one of the essential and fundamental rights rendered sacred by French legislation, such as the legal reservation, the prohibition of substitutions, &c.; in which case the right of deduction created by Article 2, of the law of July 14th, 1819, is open to them. *Id.*

3. ESPECIALLY: The widow of a citizen of the state of Pennsylvania, married agreeably to the law of that State, which is also that of the inheritance, and endowed by virtue of its matrimonial law, with one-half of all the personal property of her husband, has a right to demand in France in opposition to a French universal legatee, the transfer, by virtue of this title, of the one-half of a *rente* inscribed upon the great book of the public debt. (Treaty of Reciprocity between France and the United States of September 15th, 1853.) *Id.*

IV. *Validity of blank transfer of Stock, governed by Law of State where to take effect.*

See CORPORATION, II. 7.

CONSTITUTIONAL LAW.

I *Laws legitimating Bastards.*

1. An estate already descended cannot be divested from the legal heir, and given to the bastard child of an intestate, by a subsequent statute of legitimation; but the legislature may cure the taint of a bastard's blood for the purpose of future inheritance. *Killam vs. Killam.* 18

2. By an act of the Legislature, passed in 1853, it was provided that George W. K., son, and Emily M., daughter of George K., shall have and enjoy all the rights and privileges, benefits and advantages, of children born in lawful wedlock, and shall be able to inherit and transmit any estate whatsoever, as fully and completely, to all intents and purposes, as if they had been born in lawful wedlock." The persons named were, in point of fact, children of George K., by the same mother, who, after their birth, but before the passage of the act, had been married to a third person, X. At the date of the act all parties were living. George W. died in 1859, unmarried, and without issue, seised of land which had been conveyed to him by his father. In an ejectment by the father against a grantee of X. and his wife: *Held*, that the effect of the act of 1853, was to remove, for all purposes of inheritance, the defect of blood of the children, as though at the time of their birth their parents had been lawfully married; that the land passed, under the intestate laws of this State, to his natural parents for their joint lives, notwithstanding that the mother was then still the wife of X., remainder to his natural sister, Emily M., in fee; and therefore that the father was entitled to recover, but only as to an equal moiety of the land. *Id.*

3. *Held*, also, that the case was not affected by the general law of 1855, which provides that the estate of a bastard, dying unmarried and without issue, shall pass to his mother absolutely. *Id.*

4. *Held*, further, that the fact that the conveyance of the land in question to George W. K., by his father, was expressed to be in consideration of natural love and affection, was not material. *Id.*

II *Legal tender Notes.*

1. Defendants executed a bond with warrant of attorney, for \$28,000, payable "in specie, current gold and silver money of the United States," and "that no existing law or laws, and no law or laws which may be hereafter enacted, shall operate, or be construed as operating to allow payment to be made in any other money, than that above designated;" "the said obligors expressly waiving the benefit derived or to be derived from such law or laws."

Judgment was entered and fi. fa. issued, in which the sheriff was required to levy the debt and interest "in specie, current gold and silver money." The Court, on motion, set aside the fi. fa., and *held*: That the fi. fa. was irregular; as a final judgment is necessarily for lawful money, and is payable in any money which the law has made a legal tender. *Shoenberger vs. Watts.* 553

2. By the charter of the Bank of the State of Indiana, it was provided, that the bank should not at any time suspend or refuse payment in gold or silver, of any of its notes, bills, or obligations, &c., and that if it should neglect or refuse to do so, then the holder should be entitled to recover the amount with twelve per cent. interest. On the 1st of April 1862, the plaintiff demanded of a branch bank payment of its notes in coin, which was refused, but the amount tendered in United States legal tender Treasury Notes.

Held, (1st,) That the provision in the charter in question, did not amount to a restriction of the right of the bank to avail itself of the privilege of using anything else as money, as a tender, which the United States, by their laws, might legally declare to be such.

(2d), That Congress had not the Constitutional power to declare paper money a legal tender; but

CONSTITUTIONAL LAW.

(3d), That, considering that the Legislature and Executive Departments of the Federal Government had decided in favor of the existence of such a power, and what the consequences of an opposite decision at the present time by the court would be, they would hold the Treasury Notes to be a legal tender until the Federal Courts should determine otherwise. *Reynolds vs. Bank of the State of Indiana*, . . . 669

III. *Liability of U. S. loans to State taxation.*

1. Stock in the public debt of the United States, whether owned by individuals or by corporations, is taxable under the laws of the State *The People vs. The Commissioners of Taxes*, . . . 81

2. The taxation, by the State, of property invested in a loan to the Federal Government, is not forbidden by the Constitution of the United States, where no unfriendly discrimination to the United States, as borrowers, is applied by the State law, and property in its stock is subjected to no greater burdens than property in general. *Id.*

3. Whether Congress, for the purpose of giving effect to its powers to borrow money, and of aiding the public credit, may constitutionally enact that a stock to be issued by the Federal Government shall be exempt from taxation, *quære. Id.*

4. The cases of *McCullough vs. Maryland*, 4 Wheat. 116; *Osborn vs. U. S. Bank*, 9 Wheat. 738; and *Weston vs. The City of Charleston*, 2 Pet., examined and distinguished. *Id.*

IV. *Stay Law, validity of.*

The Indiana statute of 1861, which provides that in all cases of sales by the Sheriff on execution, after its passage, the Sheriff shall not give the purchaser a deed for, and possession of the property sold, but only a certificate entitling him to a deed and possession in one year from the sale, if the property is not redeemed in the manner therein provided, is unconstitutional, so far as it applies to sales on judgments upon contracts existing at, and before its passage. *Scoby vs. Gibson*, . . . 22*

CONTEMPT.

In refusing to testify.

See WITNESS.

CONTRACT.

I. *When varied by subsequent Parol Agreement, or by Custom.*

1. Where a contract is made by written correspondence solely, it must be treated as a contract in writing, not subject to addition or alteration by proof of the acts, declarations, and intentions of the parties aliunde. *Whitmore vs. South Boston Iron Company*, . . . 408

2. But it is competent to show that the parties subsequent to entering into the same, consented to waive any of its provisions, and to substitute others in their stead. *Id.*

3. But an additional warranty, not expressed, or implied by its terms, that the article sold is fit for a particular use, cannot be added, either by implication of law or parol proof. *Id.*

4. Nor can the question whether such warranty is fairly to be inferred from the application of the terms of the written contract to its subject-matter, or from the attending circumstances, be submitted to the jury: they should be instructed that no such warranty exists in the case. *Id.*

5. A contract to manufacture "retorts like the one before furnished" imports more than likeness in "size, shape, and exterior form." It has reference to the material and workmanship. *Id.*

6. Such a contract cannot be controlled by proving a custom in the vicinity of the transaction, that founders shall not be held to warrant

CONTRACT.

their manufacture, unless by express contract; or, in case of apparent defects, and the absence of any express agreement, that they shall have their castings returned in a reasonable time, and the right to replace them by new ones. *Id.*

7. The rule of damages for not furnishing manufactured articles according to contract, is the difference in value between those actually furnished and such as should have been, unless they were to have been furnished for a particular use. *Id.*

II. *When void as against Public Policy.*

See INSURANCE, II.

CORPORATION.

I. *Stock, how to be transferred.*

1. Upon a pledge of stock in a railroad corporation in New Hampshire, there should be such delivery as the nature of the thing is capable of, and to be good against a subsequent attaching creditor, the pledgee must be clothed with all the usual muniments and *indicia* of ownership. *Pinkerton vs. Manchester and Lawrence Railroad,*

2. Under the laws of New Hampshire, a record of the ownership of shares must be kept by such corporations in this State, and by proper certifying officers resident therein. *Id.*

3. On the transfer of stock the delivery will not be complete, until an entry of such transfer is made upon the stock record, or it be sent to the office for that purpose, and the omission thus to perfect the delivery will be *prima facie*, and if unexplained, conclusive evidence of a secret trust, and therefore as matter of law fraudulent and void as to creditors. Where the transfer was made at a distance from the office, and the old certificates surrendered, and new ones given by a transfer agent appointed for that purpose, and residing in a neighboring State, proof that the proper evidence of such transfer was sent to the keeper of the stock record to be entered by the earliest mail communication, although not received until an attachment had intervened, would be a sufficient explanation of the want of delivery, and such transfer would be good against the creditor. *Id.*

4. But where the pledge was made in Boston on the eighth day of July by a delivery over of the certificates, and nothing more done until the third day of the following August, and then the old certificates surrendered to the transfer agent there, and new ones received from him, and notice given by the first mail to the office at Manchester in this State: *It was held*, that as against an attachment made between the obtaining the new certificates and the notice at the office, the possession was not seasonably taken, and the transfer was therefore not valid. *Id.*

5. Where, upon a sale on execution of shares in a corporation, a certificate is demanded of the corporation by the purchaser, and a suit is brought for refusing to give such certificate, the measure of damages is the value of the stock at the time of the demand, with interest, and not the value at the time of trial or at any intermediate period. *Id.*

II. *Fraudulent issue of Stock.*

R. & G. L. Schuyler being the owners of one hundred and sixty shares in the defendants' company, of which R. Schuyler was the Register and Transfer Agent, the latter in 1849 delivered to the plaintiffs, as collateral security for a debt due by him, certificates for ninety of those shares, with a blank power. No application for a transfer on the books of the company, as required by the charter, was made until 1854, when it was discovered that R. S. had been guilty of a fraudulent over issue of the stock of the company to his firm, but there was no evidence that any of this spurious stock had passed out of the hands of the firm before the deli-

CORPORATION.

very of the genuine certificates to the plaintiffs. The company subsequently refused to allow the transfer of the latter. *Held,*

1. *Burden of proof.*—It is incumbent upon the defendants to show, if such be the fact, that these certificates do not represent the genuine stock of the company, that being a fact more exclusively in their power to prove.

2. *Plaintiffs' title.*—The plaintiffs are to be regarded as the first and only equitable purchasers and owners of ninety of the one hundred and sixty shares of genuine stock held by Schuyler.

3. *Plaintiffs' title not lost by delay.*—The *bona fide* holders of such certificates had a right to rely upon them, as securing to the owners the shares which they represented, against all transfer to other parties.

4. *Notice to the Company.*—The *knowledge* of Schuyler that these certificates were held by *bona fide* purchasers, for value, was notice to the Company, while he acted as their transfer agent in registering the transfers to subsequent parties, and thus affected them, constructively, with the fraud of their agent, and thereby avoided the effect of such transfers as between the plaintiffs and the Company, and rendered them liable to make good the plaintiffs' loss thereby sustained.

5. *Semble.*—It is by no means certain that the transfers registered are to be regarded as having operated upon the plaintiffs' shares.

6. *Blank transfers.*—Blank powers of attorney, for transferring stock, although under seal, may be filled up at the convenience of the transferee, and thus operate as of their date.

7. *Lex loci.*—Such being the settled law of the State of New York where this instrument was intended to take effect, will remove all question as to its validity, even if we admit that the law of the place where it was executed is otherwise. *Bridgeport Bank vs. The New York and New Haven Railroad,*

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III. *Assignment of Railroad to Creditor, when passes License to use a Patent.*

See PATENT.

IV. *Subscriptions by Towns, &c., to Stock.*

See MUNICIPAL SUBSCRIPTION.

COSTS.

Attorney's Lien for.

See ATTORNEY.

CUSTOM.

Where admissible to vary Contract.

See CONTRACT, I.

DAMAGES.

See CONTRACT, II. 7.

SLANDER.

TROVER.

DECEIT.

On sale of Articles of Food.

See SALE OF GOODS, II.

DEED.

Blank Transfers or Power of Attorney.

See CORPORATION, II. 6.

DESCENT AND DISTRIBUTION.

The Intestate law of Pennsylvania of 1833 provides that on the death of a person without issue, his parents shall take his real estate during their joint lives and the life of the survivor of them. A private statute of that state passed in 1853 enacted that A. and B. children of C. should have all the privileges, &c., of children born in lawful wedlock, and inherit and transmit real estate as such. These were the offspring of C. and of X., who had afterwards married Y. A. died intestate without issue, in 1859, at which time C., X., and Y. were all living. *Held*, that C. and X., as the legislative parents of A., took a joint life estate in his lands. *Killam vs. Killam*, 18

Held, also, that the act of 1855, which provides that the estate of a bastard shall, on his intestacy without issue, pass to his mother absolutely, did not apply. *Id.*

DOMICIL.

See CONFLICT OF LAWS, II., III.

DOWER.

I. *Right of Tenant to disprove Seisin in Husband.*

1. A tenant in an action of dower is not estopped from showing that the seisin of the husband was not such as to give his wife a right of dower, where he or his grantor has accepted a deed of the premises from the husband and claims under it, although he may be estopped from denying the right of the husband to give the deed. *Foster vs. Dwinel*, . . . 604

2. Estoppels are mutual. The wife is not estopped if the husband, in a deed, misstates his title—as one not giving dower. *Id.*

3. Dower is no part of the estate of the husband, but an independent and inchoate right, which may become an interest in the estate after his death, if his seisin was such as to give it. But the law will not create this estate by the operation of an estoppel where it otherwise would not exist, where the tenant has simply accepted a deed from the husband, which does not allude to the matter of dower, or to the existence of the wife. *Id.*

4. Where it appears in the deed from the husband, that his title is only that of mortgagee before foreclosure, no estoppel can arise. *Id.*

II. *Wife of Mortgagee when dowable.*

The wife of a mortgagee cannot claim dower in an estate until the same is foreclosed by the husband. *Foster vs. Dwinel*, 604

EASEMENT.

See WAY.

ERRORS AND APPEALS.

Discretion at Trial of Case.

1. As a general rule, the party holding the affirmative of the issues has the right to open and conclude the argument to the jury; but such practice being within the discretion of the court, the refusal to give the defendant the conclusion will be no cause for reversal of the judgment. *Reichard vs. The Manhattan Life Insurance Company*, 547

2. No exception lies to the decision of a judge of the superior court upon the question whether a deposition which has been read in evidence in a trial shall be delivered to the jury when they retire to consider of their verdict. *Whithead vs. Keyes*, 471

EQUITY.

I. *Jurisdiction over separate Estate of Married Woman.*

See MARRIED WOMAN'S ACTS.

EQUITY.**II. Specific Performance of Building Covenants and Restrictions.**See **INJUNCTION.****ESCAPE***Action for.*See **ARREST, I.**
SHERIFF.**ESTOPPEL.**See **DOWER, I. 1, 2.****EVIDENCE.****I. Examination of Witnesses.**

When the plaintiff in the course of a trial calls out the declarations of the defendant, it does not follow, that all that was said by defendant can be given in evidence, but only that which tended to qualify that given in evidence by the plaintiff, and no more. *Brouner vs. Goldsmith et al.*, 47

II. Foreign Judgment, where not inquirable into.See **PLEADING.****III. Written Contract, when varied by Parol Evidence.**See **CONTRACT, I.****EXECUTION.***On Stock, when preferred to Unregistered Pledge.*See **CORPORATION, I. 5.****FOREIGN INSURANCE COMPANY.**See **INSURANCE, II.****FRAUD.***Antecedent Debt, where constitutes a Purchaser for Value.*

If the owners of property have intrusted it to an agent for a special purpose, and the agent, in violation of his duty, has unlawfully consigned the same to be sold, with directions to remit the proceeds to a private creditor of his own, and such creditor, upon being informed by a letter from the consignee of the consignment of the property and directions in reference to the same, manifests his assent thereto by unequivocal acts, and the property is sold by the consignee, and bills of exchange, payable to the agent's creditor or his order, are purchased with the proceeds, and remitted in a letter addressed to him, in compliance with the directions, and the creditor, after receiving notice of the intended remittance, and after manifesting his assent thereto, and after the remittance is actually made, but before it is received, learns for the first time of the manner in which the agent became possessed of the property, and of his wrongful acts in reference to it, the original owners of the property cannot maintain an action for money had and received against such creditor, to recover the amount collected by him upon the bills of exchange. *Le Breton vs. Pearce.* 85

HABEAS CORPUS.*Commitment for Contempt, when examinable upon.*See **WITNESS.**

HUSBAND AND WIFE.

See DOWER.

MARRIED WOMAN'S ACT.

INJUNCTION.

Against Violation of a Building Restriction.

H., being the owner of two city lots, one a corner property, and the other adjoining it, granted and conveyed the corner lot to D. and R. in fee; reserving a perpetual ground-rent, upon the express condition that the grantees, their heirs and assigns, should not erect any building upon the back part of the lot higher than *ten* feet. H., at the time, and for some years afterwards, occupied the adjoining property as his residence. By five several mesne conveyances, all made subject to the condition, the corner property became vested in M. in fee; H. having some years prior to the conveyance to M. granted to the then owner permission to raise his back building to the height of *eleven* feet, expressly stipulating that such permission should not prejudice or impair the condition. H. died seized of the adjoining property, and also of the rent reserved out of the corner lot. His testamentary trustee granted and conveyed the adjoining property to C., no mention being made in the deed of the restriction imposed on the corner property. M. subsequently, by sundry mesne conveyances, became the owner of the rent reserved, which thus merged; and M. threatened to build in entire disregard of the restriction. C. filed a bill in equity to restrain him, and applied for a special injunction, which was refused; and M. went on and erected a three story back building. *Held*, upon appeal from the decree of the court below, refusing the injunction and dismissing the bill:

1. That although the clause imposing the restriction was a strict condition in law, yet equity would only inquire into the substantial elements of the agreement, and would enforce it for any party, for whose benefit it appeared to be intended.

2. That the duty of the defendant not to build in violation of the condition was clear; and that this duty was not reserved as a mere personal obligation to H., the original grantor, his heirs and assigns; nor for the benefit of the ground-rent; but that it was for the benefit of the adjoining property then owned by H.; and created an obligation to the owner of that property, whoever he might be; and equity would interfere to enforce and protect his right.

3. That a general plan of lots need not be shown; such a plan is only one means of proof of the existence of the right and duty; and this may appear as well from a plan of two lots, as of any greater number.

4. That the release of a part of a condition operates as a release of the whole, only where forfeiture of the estate for a breach of the condition is demanded; equity will enforce the condition in its modified form in favor of a party who asks only compliance with the agreement.

5. That the defendant having built in violation of the condition, after bill filed, the complainant was entitled to a decree of abatement without amending his bill. *Clark vs. Martin*, 479

INSURANCE.

I Authority of Officers of Insurance Company to bind by Guaranty of another Company.

1. Though by the Charter of an Insurance Company it is provided that "every contract, bargain, and other agreement," in execution of the powers of the company, "shall be in writing or print, under the corporate seal, and signed by the President, or, in his absence or inability to serve, by the Vice-President or other officer, &c., and duly attested by the Secretary or other officer," &c., a parol agreement as to the terms on which a policy shall be issued, made by the President, Secretary, or other

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general agent of the company, may, nevertheless, be enforced specifically in a court of equity, which, in case of a previous loss, will be by a decree for the amount which would be due upon a policy duly executed: *GRIER, J. Constant vs. The Allegheny Insurance Company*, . 116

2. But a mere collateral agreement, which does not involve the execution of a policy of insurance, is not within the scope of the general authority of an officer or agent of such a corporation, and cannot be enforced. *Id.*

3. The plaintiff, through a broker, applied to the defendants for an insurance on a boat for a definite amount, and was informed that "it would be taken." The defendants subsequently sent to the broker their own policy for a part, and the policies of three other companies for the residue, executed by an agent for the latter companies. The broker, on receiving the policies, wrote, in the absence of his principals, to the defendants, to say that he doubted whether the agency policies would be accepted, alleging as a reason, that the particular agent had not a good reputation for "settling losses," and added, "*I don't know whether it is your custom to guarantee the offices you insure in, or not; if you do, I may prevail on*" the plaintiff "to hold the policies." The Secretary of the defendants, in reply, wrote: "In handing the policies" to the plaintiff, "you can say that if the boat is not insured in *offices satisfactory* to him, we will have them cancelled; but, *though they are not re-insurances*, yet in case of loss we will *feel ourselves bound for a satisfactory adjustment*. We deem the companies good, and if *any parties can settle with them, we can*. On the faith of this letter the plaintiff closed the transaction. One of the substituted companies afterwards became insolvent, and, a loss having occurred, a special action on the case was brought against the defendant: *Held*, (1.) That the Secretary of the defendants had no general authority to bind them by a guaranty of the solvency of the substituted companies; and, (2.) if he had, his letter did not amount to this, but only to an undertaking for a satisfactory determination of the amount of the loss, and its apportionment between the insurers. *Id.*

II. Conditions in Policy restricting Right of Action, when void.

An agreement in a policy of insurance, executed by a foreign insurance company, that the insured waives the right to bring an action upon the policy except in the courts of the state incorporating such company, is void, both as against public policy and the statute of this state relating to foreign insurance companies of December 8, 1855; *R. C.*, p. 894. *Reichard vs. The Manhattan Life Insurance Company*, . 547

III. Representations, on Life Policy.

Where, in a policy of insurance upon life, the representation was made that the insured was sober and temperate and in good health; if the representation was true at the time it was made, the subsequent habits of the insured would be no bar to a recovery upon the policy. *Reichard vs. The Manhattan Life Insurance Company*, . 547

IV. Abandonment of Voyage, on Marine Policy.

1. An abandonment of the voyage insured and substitution of a new voyage defeats the policy of insurance from the time of such abandonment, although when the loss occurs the vessel is sailing in a track or course of the voyage common both to the voyage described in the policy, and in the substituted voyage. *Merrill vs. Boylston Fire and Marine Insurance Company*, . 842

2. Such abandonment may occur after the vessel has commenced her specified voyage. *Id.*

3. The facts in the present case present a case of abandonment, and not one of an intention to deviate, and the policy was therefore at once defeated when the master of the ship abandoned the termini of the

INSURANCE.

voyage described in the policy, and sailed from Falmouth, bound to Antwerp, as her port of discharge. *Id.*

V. *Agreement for, when enforced in Equity.*

Ante, I. 1.

INTESTATES.

I. *Succession to Estate, how affected by Domicil.*

See CONFLICT OF LAWS, III.

II. *Laws of Pennsylvania.*

See DESCENT AND DISTRIBUTION.

JUSTICE OF PEACE.

Liability for Acts when not duly qualified.

1. A justice of the peace, in an action against himself for an arrest under a warrant issued by him, cannot justify, if he had not, before such arrest, taken the oath of office prescribed by the Constitution of the State. *Courser vs. Powers,*

2. Nor will a subsequent administration of the official oath, on the same day of the arrest, enable him to do so, and the true time when such oath was taken may be shown. *Id.*

8. Neither will the taking of the official oath under an election to the same office for the previous year enable him to justify; the official oath is only commensurate with the appointment, and covers only the existing term of office. *Id.*

LAKE.

See RIPARIAN OWNERS.

LEASE.

Re-entry for Non-payment of Rent.

Our statutes with regard to the recovery of leased premises, except in the specific remedy which they provide and the notice to quit prescribed, do not dispense with the requirements of the common law on the subject. *Bowman vs. Foot,*

A lease for a term of years, under which the rent was payable quarterly on certain days named, contained the following condition:—"Provided however, that if the lessee shall neglect to pay the rent as aforesaid, then this lease shall thereupon, by virtue of this express stipulation, expire and terminate; and the lessor may, at any time thereafter, re-enter said premises, and the same possess as of his former estate." *Held,*

1. That the terms *expire and terminate* were merely equivalent to the more common expression, *shall become void.*

2. That the lease, by the non-payment of rent, did not become void, but only voidable at the option of the lessor.

8. That to take advantage of his right to avoid the lease, it was necessary for the lessor—1st. To make demand of the rent on the day it fell due, on the premises, and at a convenient hour before sunset. 2d. Upon neglect to pay the rent, to make a re-entry on the premises, or in some other positive manner assert the forfeiture of the lease. [Per STORRS, C. J., and HINMAN, J.; ELLSWORTH and SANFORD, Js., dissenting.] *Id.*

Whether, after an entry for non-payment of rent, the acceptance of the rent is a waiver of the forfeiture: *Quere.* The current of authorities is against such a doctrine. *Id.*

LEGAL TENDER NOTES.

See CONSTITUTIONAL LAW, II.

LEX LOCI.

See CONFLICT OF LAWS.

MARRIED WOMAN'S ACTS.

Liability of separate Estate, and how enforced.

1. The contracts of a *feme covert*, when necessary or convenient to the proper use and enjoyment of her separate estate by virtue of the enabling statutes (secs. 1, 2, and 3, R. S. Wis. 1858), are binding upon the estate at law. (*Conway vs. Smith*, 13 Wis.) *Todd vs. Lee*, 657

2. All her other engagements stand as before, good only in equity. (The case of *Yale vs. Dederer*, 22 N. Y. 450, considered and disapproved; a. c., 18 N. Y. 265, approved.) *Id.*

3. The change from an equitable to a legal estate, has not, with respect to her general engagements, enlarged her powers or removed the disability of coverture, but she remains as if still possessed of an estate in equity without restriction as to the *jus disponendi*, capable of charging it with debts incurred for her own benefit or the benefit of her estate, to its full extent, and such charge may be enforced in a civil action under the Code of Procedure. *Id.*

4. The action should be *in rem* not *in personam*, for she is incapable of charging herself *personally* either in equity or at law. *Id.*

5. Injunctions and receivers in such actions may be had to preserve the property during the pendency of the suits, and to convert the property and satisfy the debts, for want of other process, after judgment. *Id.*

6. The husband is a proper party, but no personal demand can be made against him in such cases. At common law the personality of the wife rests absolutely in the husband, and although he may be liable for her debts upon the principles of agency, yet, even under the Code of Procedure, to bind him or his property a separate action at law must be brought. This common law rule has no application in such cases in equity; and whether he is liable or not is a question of fact for the jury. *Id.*

7. L., a *feme covert*, the owner of a separate estate under the enabling statute, with her husband's permission, upon the faith and credit of her separate estate, purchased goods and hired a store, and engaged in trade as if she were *sole*. She failed to pay the rent, and refused to pay for the goods, because of coverture. In actions brought to charge the rent and price of the goods upon her separate estate, and to apply the goods left to liquidate the claims in suit, *Held*, That as it is an established rule in equity that a *feme covert* may, with her husband's permission, given even after marriage, become a *sole trader*, and hold the profits arising out of her business to her sole and separate use, so equity, in consideration of the benefit thus accruing to her separate property, will charge the debts properly incurred in trade upon it, and apply both her separate property and stock in trade to their payment, through a receiver. *Id.*

MISTAKE OF BOUNDARIES.

See TROVER.

MONEY HAD AND RECEIVED.

For Proceeds of Fraud.

See FRAUD.

MUNICIPAL SUBSCRIPTIONS.

Validity of.

By the provisions of a statute, the Supervisor and Commissioners of the town of S. were authorized to borrow a sum of money, not exceeding twenty-five thousand dollars, upon the credit of the town, and to execute

MUNICIPAL SUBSCRIPTIONS.

therefor, under their official signatures, a bond or bonds. They were to have no power to do any of the acts authorized by the statute until the written assent of two-thirds of the resident tax-payers was obtained and filed in the office of the County Clerk. The money, when obtained, was directed to be paid over to the president and directors of a railroad company then about to be organized for the construction of a railroad through the town. Instead of borrowing the money, the Supervisors and Commissioners executed and delivered the bonds directly to the railroad company in payment for stock for which they were authorized to subscribe, and these were subsequently sold by the company at a discount. Each of the bonds, upon which the plaintiff brought his action, stated that the requisite consent of the tax-payers had been obtained and properly filed, with a certificate of the County Clerk that a paper, purporting to be the written assent, &c., had been filed in his office. The statute did not authorize the giving of this certificate, nor did it prescribe in what method the written assent should be proved. No evidence was offered that the consent had been given other than what is above stated. The bonds on which the suit was brought were payable to bearer, and the plaintiff was a holder for value.

1. *Held*, that the power to borrow was not properly complied with.

2. That the provision requiring the assent of the tax-payers, as evidenced, was a condition precedent to the issue of the bonds, and an indispensable prerequisite to their validity.

3. That in the absence of all direct proof that the written assent had been obtained, the town was not estopped by the acts of its agents, who had issued bonds asserting upon their face that it had been, even though it had, for a considerable period, acquiesced in their acts. Such consent should have been proved affirmatively. The case does not come within the rule that when a power is conferred, if the agent does an act which is *apparently* within the terms of the power, the principal is bound by the representation of the agent as to the existence of any *extrinsic* facts essential to the proper exercise of the power where such facts, from their nature, rest *peculiarly* within the knowledge of the agent. The defect consists in the existence of the power itself, and if it did not, the facts requisite to the validity of the bonds being created by statute, were not peculiarly within the knowledge of the town.

4. The fact that the bonds were negotiable, and purchased for value without notice of the defect, does not, under such circumstances, aid the plaintiff. *Gould vs. The Town of Sterling*, 1

NEW JERSEY.

Jurisdiction over Waters of Hudson.

By the compact between the States of New Jersey and New York, approved by Congress in the year 1834, the State of New York has exclusive jurisdiction over all the waters of the Hudson River, and of and over the lands covered by the said waters, to the low-water mark on the New Jersey shore. On an indictment in New Jersey for obstructing the free navigation of the said river, by placing, sinking, and lodging in the said river certain ships, schooners, boats, and other vessels, the jury rendered a general verdict of guilty, but found as a fact that the defendants had, within the times specified in the indictment, placed and procured to be placed vessels and wrecks of vessels both above and below the low-water line, which were an interruption to the navigation. A new trial was granted. *The State vs. Babcock*, 1

Observations on the nature and ground of the compact between the States. *Id.*

NEW YORK.

Compact with New Jersey.

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OFFICE.

Liability of Officer for Acts, when not duly Qualified.

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PATENT.

Exclusive License to use Patent, where extends to Assignee for Creditors.

An assignment of the revenues of a railroad, by the company, to a preferred creditor, and the use of the rolling stock, is not a transfer of corporate entity or property. And the use, by the assignee, of cars which have attached patented brakes, does not render him liable to account for infringement upon the patent-right, when the exclusive use of the brakes had been licensed to the company by the patentee. The assignee used the brakes as an agent of the company, and not as a purchaser; and his use of them, in the name of the company, was exclusive in the meaning of the license. *Emigh vs. Chamberlain*, 207

SHIPPING.

Foreign Judgment on same Cause of Action, when a Bar.

Declaration stated that the registered owner of a British ship mortgaged it, and on the 9th of April, 1855, the plaintiff became the mortgagee; that on the 8th June, 1854, the captain, while on a voyage, drew a bill at Melbourne, in Australia, on the owner in England, for necessary disbursements of the ship, in favor of L. & Co.; that L. & Co., without value, indorsed it to the defendants, British subjects residing in England; that the bill was dishonored; that the defendants, knowing the premises, and that the ship was about to call on her voyage at the port of Havre de Grace, in France, and that by the law of France the bona fide holder for value of such a bill (if a French subject), could take proceedings in the French courts and attach and sell the ship, conspired with T., a French subject, that they should indorse the bill to him without value, and that he should take proceedings in the French courts, and falsely represent that he was bona fide holder of the bill for value; and thereupon T., upon the arrival of the ship in a French port, took proceedings in the French courts, and therein obtained orders for the attachment and sale of the ship; and the plaintiff was deprived of his property in the ship: *Held*, that this being a judgment in rem, though in a foreign court, an action could not be maintained while it remained unreversed, as it was consistent with the averments in the declaration that the plaintiff had notice of the proceedings in France, and allowed judgment to go by default, or even that he appeared in the French court, and the question whether T. was a holder of the bill for value was decided against him. *Castrique vs. Behrens and others*, 48

WARRANTS OF ATTORNEY.

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Rights of on Inland Lakes.

The rule of riparian proprietorship upon the river Detroit, as laid down
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in *Lorman vs. Benson*, 8 Mich. 18, is applicable to Lake Muskegon; and the ownership of land bordering upon the lake, carries with it the ownership of the land under the water, so far out as it is susceptible of beneficial private use, but subordinate to the paramount public right of navigation, and the other public rights incident thereto. *Rice vs. Ruddiman*, . 615

SALE OF GOODS.**I. Bill of Parcels.**

When the contract of sale is complete, its terms cannot be changed, by reference to a bill of parcels subsequently rendered by the vendor. *Allen vs. Schuchardt*,

II. Implied Warranty of Soundness of Food.

A butcher purchased a carcass of beef exposed for sale in Newgate market, of a meat salesman there, without any express warranty of its soundness. Upon the meat being cooked, it was discovered to be unfit for human food, and returned. The defect did not appear when it was raw, and there was no evidence that defendant knew, or had any reason to suspect, that the beef was otherwise than good and wholesome meat, fit for human food:

Held, that there was no implied warranty in such case, and as there was no proof of any express warranty, the plaintiff could not recover; that no action for deceit would lie, as there did not appear, on the part of the defendant, to be fraud. *Emerton vs. Mathews*,

III. Sales by Sample.

S. acting for parties at Amsterdam, put into the hands of a broker in the city of New York a sample bottle of a quantity of madder, to negotiate a sale. The sale was made in Rhode island, by the broker, in the name of S., the foreign principal not being disclosed, under an oral contract to A., upon the inspection of the sample bottle, which he refused to open on account of the instructions of S. The madder was, at the time of the sale, in barrels, in a vessel at the port of New York. After the contract was made, a bill of goods was furnished to the purchasers, with a clause, that "no claims for deficiencies shall be allowed unless made within seven days from receipt of goods." The madder in the casks proving inferior to its apparent qualities in the bottle, an action on the case was brought against S., by the purchasers, for damages.

Held—1. The oral contract made in Rhode Island, where the statute of frauds does not prevail, can be enforced here, although the contract, if made in the same manner in New York, would have been void. The fact that the merchandise was in New York does not affect the question.

2. The action on the case is a proper remedy, and it is not necessary to aver a *scienter*.

3. The sale was by sample, and there was an implied warranty that the merchandise should correspond with the apparent qualities of the sample.

4. The clause in the bill of goods respecting deficiencies, is inoperative, as the contract was previously complete.

5. S. not having disclosed his principals, is personally liable. *Allen et al. vs. Schuchardt et al.*,

IV. Warranty implied from Custom.

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Con. TUYLER FRAUDS.
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SHERIFF.*Action against, for Escape.*

In an action against a sheriff for an escape suffered by his deputy, the return of a rescue upon the writ is not conclusive evidence in favor of the defendant. *Whithead v. Keyes*, 471

And see **ARREST, I.**

SLANDER.*What Evidence in Mitigation.*

In an action of slander, charging the defendant with having accused the plaintiff of the commission of the crime of adultery, it is competent for the defendant, in mitigation of damages, to prove that the plaintiff, before the speaking of the words, was commonly reputed to be unchaste and licentious. *Bridgeman vs. Hopkins*, 168

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See **CONFLICT OF LAWS, I.**

TEAMBOAT.*Inspection Laws of United States.*

1. A vessel propelled in whole or in part by steam, is not liable to a penalty for transporting goods, wares and merchandise, without inspection of the hull and boilers, under the act of Congress of August 30, 1852. The penalty is alone for transporting passengers. *United States vs. The Propeller "Sun,"* 227

2. *Quere.*—Can a vessel belonging at the port of Buffalo, where inspectors are located by the act of August 30, 1852, be inspected at the port of Chicago? *Id.*

3. An answer to a libel of information must be full and explicit to each article. It must deny the charges, or confess and avoid them by proper averments of facts. *Id.*

4. A steamboat employed in transporting passengers between ports in the same State, is not liable to a penalty for not having the hull and boilers inspected under the act of Congress of August 30, 1852, and the District Court has no jurisdiction. *United States vs. Steamboat "Seneca,"* 281

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ROVER.*For Coal dug by mistake of Boundaries.*

1. Trover will lie to recover the value of coal dug by the owner of land, through a mistake of boundaries, out of adjoining land. *Forsyth vs. Wells*, 227

2. The measure of damages in such action, there being no wrongful purpose, will be the fair value of the coal in place, as if on a purchase of the coal field from the plaintiff, and not its value when mined. *Id.*

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ARRANTY.

See **SALE OF GOODS, II., III., IV.**

WAY.

Right of, by Necessity.

A right of way cannot arise from *mere necessity*, independent of any grant or reservation, express, or implied as in the case of a former unity of ownership. *Tracy vs. Atherton et al.* 79

WILL.

I. *Undue Influence in procuring, when presumed.*

1. In an issue to try the validity of a will, which was contested on the ground of undue influence, want of mental capacity, coercion, and on other grounds, it appeared that, by the alleged will, the testator gave a trifling sum to his only legitimate child, and then bequeathed the residue of his property to the children of a woman with whom he was alleged to have been living in adulterous intercourse. There was no direct evidence given or offered of want of mental capacity at the time, or of any actual coercion or influence exerted in the testator as respects the testamentary act; but it was proposed to prove the fact of this adulterous intercourse, which was of long continuance, and which had obliged his wife and daughter to abandon his house, and that the alleged adulteress was a woman of vigorous character, and exerted a despotic influence over his actions generally, in connection with the fact that he was suffering from a painful disease, to relieve which he took opiates, as tending to show undue influence generally. *Held*, that the evidence was admissible for this purpose, on the ground that the relation being an unlawful one, the influence which sprang from it must also be unlawful. *Dean vs. Negley*, 28

2. *Semble*, by LOWRE, C. J., that this would be a presumption of law. *Id.*

II. *Effect of change of Domicil upon.*

See CONFLICT OF LAWS, II.

WITNESS.

When compellable to testify.

The Constitution (Art. 1, § 6,) does not protect a witness in a criminal prosecution against another, from being compelled to give testimony which implicates him in a crime, when he has been protected by statute against the use of such testimony on his own trial. *The People vs. Kelly*, 534

That the information thus elicited facilitates the discovery of other evidence by which the witness may be subsequently convicted, is an incidental consequence against which the Constitution does not guard him. Its prohibition is simply against his being required to give evidence where he himself is upon trial. *Id.*

The refusal of a witness to answer a proper question before a grand jury, is punishable as a contempt under the statute (2 R. S., p. 534, § 1, p. 785, § 14) as committed in a proceeding upon an indictment. *Id.*

When the refusal was reported by the grand jury to the court in the presence of the witness, who did not deny but justified the same, and reiterated the refusal, the contempt is one "in the immediate view and presence of the court," and no affidavit or further evidence is requisite to a commitment. *Id.*

The appellate court, before which the propriety of a commitment for contempt is brought by *certiorari*, or even collaterally on *habeas corpus*, is bound to discharge the prisoner where the act charged as criminal is necessarily innocent or justifiable, or where it is the mere assertion of a constitutional right. *Id.*

The adjudication of the court in which the alleged contempt occurred, while conclusive that the party committed the act whereof he was convicted, and of its character when that might, according to the circumstances, be meritorious or criminal, cannot establish as a contempt that which the law entitled the party to do. *Id.*

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